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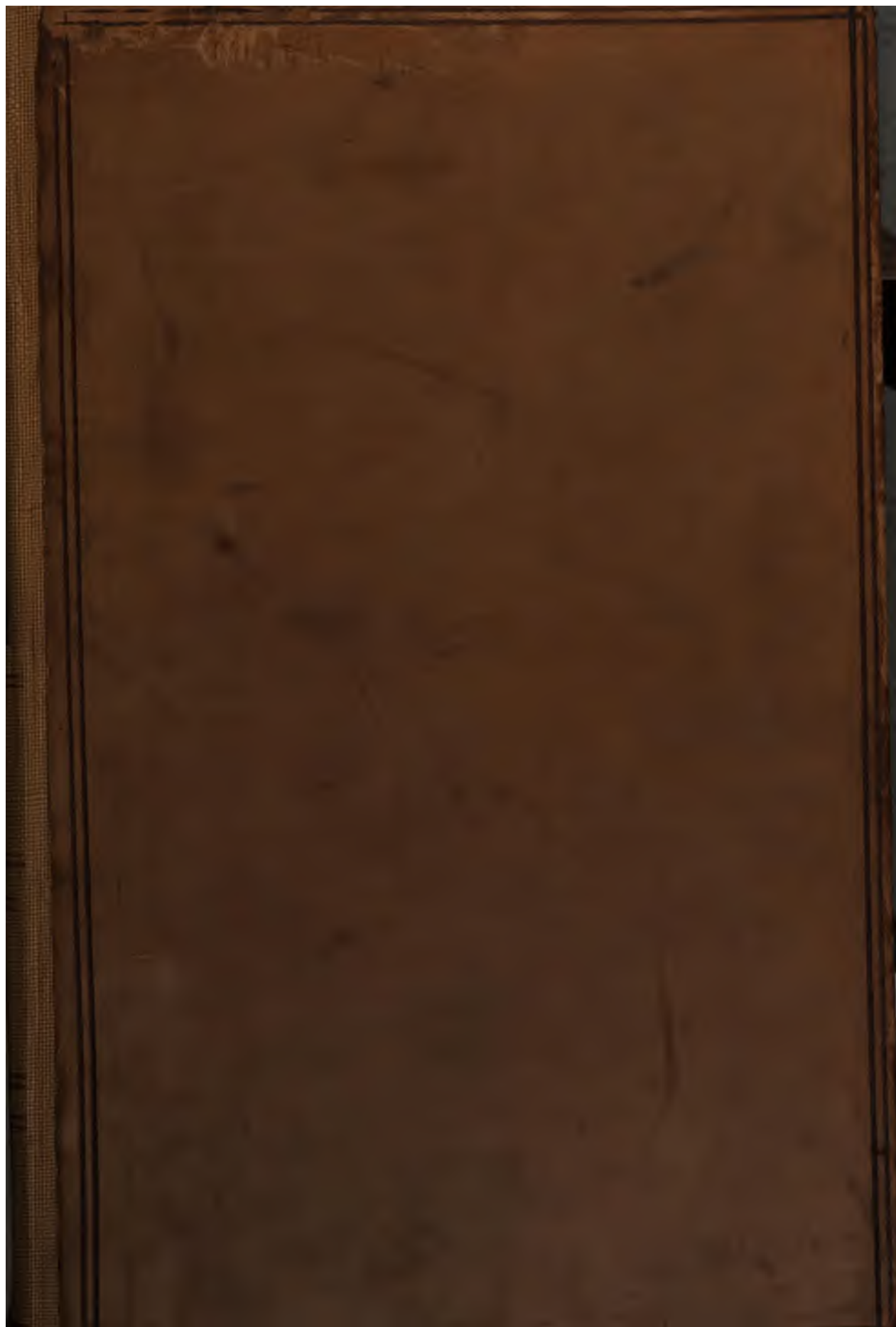
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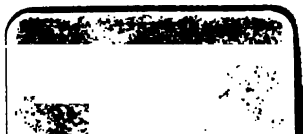
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REPORTS
OF
CASES IN CHANCERY,

ARGUED AND DETERMINED

IN
THE ROLLS COURT

DURING THE TIME OF

THE RIGHT HONORABLE
SIR JOHN ROMILLY, KNIGHT,
MASTER OF THE ROLLS.

BY
CHARLES BEAVAN, ESQ., M.A.
BARRISTER AT LAW.

VOL. XVI.
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LORD CRANWORTH, *Lord Chancellor.*

SIR JOHN ROMILLY, *Master of the Rolls.*

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SIR GEORGE JAMES TURNER, } *Lords Justices.*

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SIR WILLIAM PAGE WOOD, } *Vice-Chancellors.*

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SIR RICHARD BETHELL, *Solicitor-General.*

A

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REPORTS

OF

CASES

ARGUED AND DETERMINED

1852.

IN

THE ROLLS COURT.

WILLIAMS v. LOMAS.

March 22.

THE testator devised some real estate to *Lomas and Wood*, for 500 years, upon trust to raise 2,400*l.*, and place it "upon government or real security," and pay the interest to *Sarah Benton* for life; and, after her decease, to pay the principal to such persons, &c., as she, *Sarah Benton*, should by will appoint; and in default, amongst her children.

The testator died in 1822, and in 1828 the trustees raised the 2,400*l.*; but instead of investing it, as directed by the will, they allowed it to be received by *Sarah Benton* and her two children (the Plaintiff, *Anne Williams*, the wife of *Robert Williams*, and *John Benton*). By an indenture dated 22nd of May 1828, *Sarah Benton*, *John Benton*, and the Plaintiff and her husband, so far as they were competent to do so, ordered the trustees to pay over the fund to her on an indemnity, and she afterwards appointed the fund to the Plaintiff and others, who filed a bill to make the released

trustees liable for a breach of trust. Held, that by the appointment, the fund became assets for answering *A. B.*'s liabilities, of which the indemnity was one, and that, therefore, the trustees were not liable.

1852.
 WILLIAMS
 v.
 LOMAS.

released *Lomas* and *Wood* from the 2,400*l.*, and all actions and accounts thereof, and they covenanted to indemnify them. And *Sarah Benton* covenanted with the trustees, that her testamentary power, and all applications to be made by her, should stand as an indemnification to them.

Sarah Benton died in *March* 1850, having, by her will dated in *January* 1850, appointed the 2,400*l.* as to a moiety in favour of her daughter, the Plaintiff, for her separate use for life; and as to the residue in trust, for the wife and children of *John Benton*.

By this bill the Plaintiff insisted, that she was not bound by the deed of 1828, executed by her during coverture; and prayed a declaration, that the trustees had been guilty of a breach of trust in not investing the 2,400*l.* according to the directions of the testator's will, and seeking to fix them with that sum and interest.

The trustees insisted on the benefit of the deed of 1828.

Mr. *Roupell* and Mr. *F. T. White*, for the Plaintiff.

Mr. *Keene*, for the Plaintiff's husband.

Mr. *R. Palmer* and Mr. *Freeling*, for the trustees.

Mr. *Drewry*, for the assignees of *John Benton*.

Mr. *Goodeve* and Mr. *Smythe*, for incumbancers.

The MASTER of the ROLLS.

It is manifest, that the Plaintiff is not entitled to any decree respecting the 2,400*l.* The state of the case is this:—A lady, who was a single woman, was tenant for life of a fund, and had a testamentary power of appointment

ment over it. She induced the trustees to advance money to her and her children upon an indemnity.

1852.

WILLIAMS
v.
LOMAS.

If she had died without executing the power of appointment, the fund would have gone to her children as in default of appointment, and the money advanced would have constituted a mere debt against her general personal estate. But *Jenney v. Andrews* (a), which has been followed by other authorities (b), decides this:—that where a person having a general power of appointment by will makes an appointment, the appointee is a trustee for the creditors, and the appointed fund is applicable to the payment of the debts of the donee of the power. The question therefore is, whether the fund is not applicable to the payment of her debts.

It is admitted that she received the 2,400*l.*, and that she has covenanted to make this sum applicable for the purpose of indemnifying the trustees. She has executed the power in favour of other persons; the fund would therefore be assets for the payment of her debts and liabilities, and this is one of them.

If the testatrix had other property, this question might be raised: it might be said, that these appointees were in the position of specific legatees of the appointed fund, and that, as the debts ought to be thrown on her general assets, the plaintiff is entitled to be recompensed out of the general assets. This, however, is not a suit for the administration of the estate of Mrs. *Benton*; and without saying what the rights of the Plaintiff may be, I wish the present decree to be made without prejudice to any case which she may make against the general estate of *Sarah Benton*.

(a) 6 *Madd.* 254. edition, 29; and 1 *Sugden* on
(b) 2 *Sugden* on Powers, 6th Powers, 6th ed. 123.

1852.

March 25.

NEWMAN v. WHITE.

A Defendant took out a warrant for six weeks' "further time to answer." The Plaintiff's solicitors indorsed it, "we consent to fourteen days." The order, as drawn up, gave the time "to plead, answer, or demur, not demurring alone." The Defendant having put in a plea of the Plaintiff's insolvency, it was ordered to be taken off the file with costs, and the order was varied so as to limit it to time to answer only.

THE Defendant obtained three weeks' time to plead, answer, or demur, not demurring alone. At the expiration of that time, he took out a warrant underwritten "for six weeks' further time to answer." The Plaintiff's solicitors indorsed the warrant as follows:—"We consent to fourteen days." The order was, on the 3rd of March 1852, drawn up, allowing the Defendant fourteen days "to plead, answer, or demur, not demurring alone." On the 12th of March, the Defendant put in a plea to the whole bill, stating that the Plaintiff had, in 1827, taken the benefit of the Insolvent Debtors' Act.

It was now moved, on behalf of the Plaintiff, that the plea might be taken off the file, and that the order of the Master might be varied or discharged as to the liberty thereby given to plead or demur, not demurring alone.

Mr. *R. Palmer*, in support of the motion, cited *Brooks v. Purton* (a); *Chambers v. Howell* (b).

Mr. *Roupell* and Mr. *Faber*, *contrâ*, cited *Hunter v. Nockolds* (c).

The MASTER of the ROLLS varied the order of the Master by confining it to the leave to answer only, and ordered the plea to be taken off the file, with costs.

(a) 1 *Y. & Col. (C. C.)* 278.

(c) 2 *Phillips*, 540.

(b) 12 *Beavan*, 563.

1852.

Re BARNARD.

March 26.

April 2.

IN this case, the same question arose as in *Re Gedye (a)*.

Mr. *Wetherell* presented a special petition for the taxation of three bills of costs of his solicitor, Mr. *Barnard*, for business at law and in equity. Two of these bills had been delivered more than twelve months, and the third, amounting to 780*l.*, had been delivered within the year.

In *November* 1851, the solicitor had commenced an action of debt, in the Common Pleas, for the recovery of the amount of his three bills. An order had been made by Mr. Justice *Talfourd* to tax them upon terms. Various proceedings had taken place in the action; but ultimately, the Defendant having withdrawn all his pleas, the Plaintiff signed judgment by default, and assumed exoneration.

The Defendant afterwards applied to the Common Pleas to obtain a taxation of the bills; but the application was refused by Mr. Justice *Talfourd*, on the ground that this Court had no jurisdiction to order a taxation after final judgment. Other subsequent applications to mitigate the severity of the judgment were likewise refused.

(a) 15 *Beavan*, 254.

Mr. *Knight Bruce* however, expressing no opinion on the point.

Held, secondly, by Lord *Cranworth*, that

no order can be made for taxation, after such an order has been refused, by a Court of co-ordinate jurisdiction.

Held, by the Master of the Rolls, that, after judgment by default, in an action of debt for a solicitor's bill, in which the amount had not been ascertained, a taxation may be ordered, upon sufficient "special circumstances." But held, on appeal, by Lord *Cranworth*, that there could be no taxation under the statute after final judgment; Lord Justice *Knight Bruce* however, expressing no opinion on the point.

1852.
 Re
 BARNARD.

Mr. *Wetherell* then presented a special petition to this Court for the taxation of the bills, alleging both excessive and improper charges, and objecting to some items of fees to counsel, which had never been paid.

Mr. *Lovell*, in support of the petition, argued, that after verdict and writ of inquiry, there might be a taxation on showing "special circumstances," and that here the facts proved amounted to sufficient "special circumstances" (6 & 7 *Vict. c. 73, s. 37*); that if after the verdict of a jury, ascertaining the amount due, there could be a taxation, it would be absurd to preclude taxation, when, under the proceedings, the amount due had in no way been determined.

Mr. *Stuart* and Mr. *Prior*, *contrà*, argued, first, that taxation was altogether precluded by the final judgment; and, secondly, that the proceedings at law refusing taxation after judgment were conclusive, and could not be reversed by this Court (*a*).

Mr. *Lovell*, in reply.

The MASTER of the ROLLS said his impression was, that a judgment by default in an action brought in such a form that the amount due could not be ascertained by a writ of inquiry, would not preclude a taxation, provided the Court saw that there were sufficient "special circumstances" to entitle the client to such an order; and that he would, therefore, consider, whether there were any such circumstances.

April 2. The MASTER of the ROLLS.

I expressed my opinion, that the fact of obtaining a judgment by default, where there was no verdict or writ

(*a*) See *Jones v. James*, 2 *Keen*, 186.

writ of inquiry, was no reason why there should not be a taxation. I am confirmed in that view; and in *Re Whicher* (a) it does not seem to have been disputed. I find no authority that such a judgment excludes taxation at law, and in my opinion it is not so. As to the bills delivered more than a twelvemonth, I think there are not sufficient circumstances to induce me to order a taxation; but as to the last bill delivered within a twelvemonth, I entertain a different opinion. It appears that I have jurisdiction, some of the matters being in respect of proceedings in equity, and I am of opinion that I ought to exercise it by ordering a taxation of the third bill.

1852.

Re
BARNARD.

(a) 13 *Mee. & Welsby*, 549.

NOTE.—On an appeal by the solicitor to the Lords Justices on the 30th of June 1852, Lord Justice *Knight Bruce* was of opinion, that such an order could only be supported upon “special circumstances,” and that, in the present case, they were not sufficient. Lord Justice Lord *Cranworth* was of opinion, that the matter having been already adjudicated on by a Court of co-ordinate jurisdiction, could not be re-opened here; and, further, that after final judgment at law, the matter being *res judicata*, there could be no taxation under the statute. Lord Justice *Knight Bruce* then added, that he wished it to be understood, that he had given no opinion on the second ground of Lord Justice Lord *Cranworth*’s judgment. *M. S.*, and see 2 *De G. M. & G.* 359.

1852.

March 27.

BELL v. BARCHARD.

A. granted *B.* a lease containing a covenant against assignment. *A.* afterwards agreed to cancel the lease, and to grant *B.* a much more beneficial one, "as a reward for the great improvement he had made in the estate, and as an encouragement for his general industry." *A.* died before executing the second lease, and *B.* filed a bill for specific performance against his representatives. A compromise was effected for granting a lease for a reduced term,

IN 1840, Mr. *Hilton* granted to the Plaintiff a lease of a farm for fourteen years, at a rent of 212*l.*; and the lease, amongst other covenants, contained one against assignment.

In 1846, Mr. *Hilton* signed a paper, by which he agreed to cancel the lease, and to grant the Plaintiff a new lease for twenty-eight years, at the reduced rent of 100*l.* a-year; and he authorised the Plaintiff to build a house and cart-shed, and deduct the amount (not exceeding 400*l.*) out of the rent; and this, he said, he did "as a reward for the great improvement the Plaintiff had made in the estate, and as an encouragement for his general industry."

Mr. *Hilton* died in 1849, having devised the estate to his sister, the wife of Mr. *Barchard*.

The Plaintiff having filed his bill against Mr. and Mrs. *Barchard*, for specific performance, it was agreed by letter and by way of compromise, between the solicitors, that a lease should be granted for twenty-one years, from *Michaelmas* 1850, at the reduced rent of 100*l.* a-year, "the lease to contain all covenants usual and ordinary in farming leases."

The draft lease contained a covenant not to assign, or under-let the farm; and this being objected to by the
the
contain all covenants usual and ordinary in farming leases." It was insisted by the tenant, that under the compromise, there should be no restriction against assignment; but held, that the Master, in settling the lease, was to have regard to the original lease and to the custom as to farming leases, if any.

the Plaintiff, he filed a claim for the specific performance of the contract for compromise.

1852.

BELL

v.

BARCHARD.

Mr. *Kenyon Parker* and Mr. *Jolliffe*, in support of the claim.—The agreement is, that the lease shall contain all “usual and ordinary” covenants; and it has been settled, that a covenant against assignment is not one of that description: *Henderson v. Hay* (a), *Boardman v. Mostyn* (b), *Church v. Brown* (c), and see *Vere v. Loveden* (d).

The restriction is oppressive, for if the Plaintiff were obliged by bad health to go abroad, he would be bound to pay the rent, though incapable of transferring the lease. There ought to be a declaration, that the Defendants are not entitled to such a covenant.

Mr. *R. Palmer* and Mr. *Burdon*, for the Defendants. The first lease restricted the tenant from assigning, the second would have been in the same form, and the compromise merely varied the duration of the term.

Secondly, a married woman is not bound by the contract, *Jones v. Jones* (e), *Emery v. Wuse* (f), *Neale v. Mackenzie* (g), *Thomas v. Dering* (h); and no indemnity can be given, *Aylett v. Ashton* (i).

The MASTER of the ROLLS desired Mr. *K. Parker* to confine himself to the question, whether, on the reference to the Master, the Court ought not to direct him

(a) 3 Bro. C. C. 632.

(b) 6 Ves. 467.

(c) 15 Ves. 258.

(d) 12 Ves. 179.

(e) *Ibid.* 186.

(f) 8 Ves. 505.

(g) 1 Keen, 474.

(h) *Ibid.* 729.

(i) 1 Myl. & Cr. 105.

1852. him to have regard to the agreement of 1846, and the
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 BELL former lease.  
 v.  
 BARCHARD. Mr. *K. Parker*, in reply.

*The MASTER of the ROLLS.*—I am of opinion, that the letters form a sufficient contract, and that there must be a specific performance. There must be a reference to the Master to settle the terms of the lease with reference to the former lease; and I think it necessary to make a special direction to the Master, because I am of opinion, that the true construction of the contract now sought to be enforced is affected by the circumstances which existed between the parties previous to the compromise, and may differ from what it would have been, if these parties had had no dealings previous to the first of the letters written by the solicitors.

The circumstances of the case are these:—The testator, in 1840, granted a lease to the Plaintiff, in which there was a covenant against assignment. In 1846, he signed a paper, in which he agreed to cancel the old lease, and to grant a new lease at half the rent; and the lessee was to be at liberty to lay out 400*l.* of his rent on buildings. But this the testator assented to “as a reward for the great improvement the Plaintiff had made in the estate, and as an encouragement for his general industry.” If the matter stopped there, and if this were a binding contract, the testator, beyond doubt, must have intended, that the substituted lease should contain a covenant like the old one, which would confine the possession to the lessee, and would restrict him from under-letting the farm to persons who might not keep the property in repair and in a state of improvement, which was evidently an  
 important

important consideration with the testator; for it was to reward the Plaintiff for the improvement of the farm, and as an encouragement to his industry relative to the property, that he consented to reduce the rent; and it would, I think, be inconsistent with this contract, that the lessee should have power to under-let the farm.

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BELL  
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BARCHARD.

The testator died three years afterwards, without having executed the lease. After some negotiation between the Plaintiff and the Defendants, who both at law and in equity represent the testator, the Plaintiff filed his bill for specific performance of the contract for the new lease. Proposals for a compromise were entertained, in which the Defendants say, "If you will reduce the lease to a reasonable term, we will not resist your having such a lease." That was agreed to, and the letters in question were written, constituting the contract. One of them refers to a variation in the terms; and it is agreed, that the lease shall be for twenty-one years, and "contain all covenants usual and ordinary in farming leases." I am called on to say, that the true construction is, that the lease to be granted is not to contain the provisions contained in the lease under which the Plaintiff held; on the other hand, it is said, that the words are cumulative, and that the lease, in addition to the covenants under which the lessee then held the property, is to contain all other usual covenants. I do not wish to fetter the Master's judgment further than this: to direct him in settling the lease, to have regard to the covenants in the lease of 1840, and also to any custom as to farming leases which may prevail in the neighbourhood.

This is the contract of the husband, and is only binding

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 v.  
 BARCHARD.

binding as a contract for a lease of twenty-one years (a). The cases of *Neale v. Mackenzie*, and *Thomas v. Dering*, were not similar to the present.

I am of opinion, that the Master must settle this lease, having regard to the covenants in the original lease of 1840; and I shall give no further order as to this lease, except by declaring that the agreement must be specifically performed.

(a) 32 *Hen. 8, c. 28, s. 3.*

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NOTE.—The Plaintiff appealed, but the matter was arranged.

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April 15, 19.

#### CLARKE v. TIPPING.

After decree a Plaintiff became bankrupt, it was ordered, that he and his assignees should elect either to file a supplemental bill, or that all proceedings should be stayed.

**A**FTER decree, the Plaintiff became bankrupt.

Mr. *Selwyn*, on behalf of the sole Defendant, now moved, that the assignees of the Plaintiff might either elect to file a supplemental bill, or that all further proceedings might be stayed. He argued, that if there had been no decree, the order would then have been, that the assignees should either proceed in the cause, or that the bill should be dismissed; but as there had been a decree in the cause, the motion, in its present terms, was proper.

Mr. *Bazalgette*, *contra*, for the bankrupt.—Such an order cannot be made after decree, because the Defendant may himself, after decree, take the proper steps for placing the record in a proper state, by filing a supplemental bill; but before decree, the Plaintiff alone  
 can

can do so. The 63rd Order of the 8th of May 1845 was referred to (a).

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v.  
TIPPING.

The assignees did not appear.

Mr. *Selwyn*, in reply.—The bankrupt has no right to appear on the motion; his interest has passed to his assignees. It would be a great inconvenience to compel a Defendant to proceed in a suit which he has no desire to prosecute, and if the assignees do not think fit to proceed, the suit should not be allowed to impend over the Defendants without limit.

*The MASTER of the ROLLS.*

I think I may make the order against the assignees in the terms of the motion. I have known such orders made, but I believe they have been unopposed. I will reserve the question as to the bankrupt.

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*The MASTER of the ROLLS.*

April 19.

I have been referred to the case of *Whitmore v. Oxborrow* (b), in which, after decree, both the Plaintiff and Defendant became bankrupt, and the assignees of the latter were brought before the Court by supplemental bill. They afterwards moved, that the assignees of the Plaintiff might file a supplemental bill, &c., or that the suit might be dismissed. The Court ordered, that the Plaintiff should elect, within ten days, whether they would prosecute the suit, and if they should not elect, that all further proceedings should be stayed.

Let an order be drawn up in conformity with that decision.

(a) *Ord. Can.* 307.

(b) 1 *Coll.* 91.



1852.

April 21.  
May 24.

## BRYAN v. COLLINS.

A testatrix, who died in 1819, bequeathed a legacy to accumulate in trust for the eldest daughter of *A. B.*, to be paid at twenty-one, and if none, to the eldest daughter of *C. D.*, payable in like manner. *A. B.* never had a daughter, and died in 1851. *C. D.* had a daughter *G.* born in 1821, and who died in 1827, and other daughters. Held, that the representative of *G.* was entitled to the legacy, and to the accumulations accrued down to 1827, together with simple interest thereon from that time to the day of payment in 1852.

THE testatrix, *Jane Clementina Bryan*, by her will, bequeathed a certain debt to trustees, upon trust to receive and invest, "*and accumulate the interest thereof*" upon trust for the eldest daughter of *Mary Doyle*, to be paid to her on attaining her age of twenty-one years, or on the day of her marriage with the consent of her parents or guardians, which should first happen; and if there should be no such daughter, then in trust for the eldest daughter of *George Bryan*, jun., to be paid and payable, in like manner, on her attaining twenty-one, or marriage; and, in case there should be no such daughter, then in trust for the second son of *George Bryan*, jun., to be paid at his age of twenty-one years; and, in case there should be no such son, then in trust for such person or persons as should then be his next of kin.

The testatrix died on the 22nd of *September* 1819.

Neither *Mary Doyle* nor *George Bryan* had any daughter at the testatrix's death.

In 1822, the debt, amounting to 1,140*l.*, was received and invested in 1,400*l.* consols.

*George*

accumulations accrued down to 1827, together with simple interest thereon from that time to the day of payment in 1852.

## DATES.

1819. *Sept.* 22. Death of testatrix.  
1821. *Feb.* 9. *Georgiana* born.  
1827. *Oct.* 19. Her death.

1830. *Sept.* 22. Twenty-one years  
expire.  
1851. *Mary Doyle* died.

*George Bryan* married in 1820, and had a daughter, *Georgiana Augusta*, who was born in *February* 1821, and died the 19th of *October* 1827, and another daughter, *Augusta Mary*, who was still living, and he died in *October* 1827.

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BRYAN  
v.  
COLLINS.

*Mary Doyle* died, in *February* 1851, without having had any issue, and thereupon a bill was filed by the legal personal representative of *Georgiana Augusta Bryan*, claiming the fund and the accumulations, which now amounted to 3,521*l.*

Mr. *R. Palmer* and Mr. *Renshaw*, for the Plaintiff. *Georgiana Augusta*, at her birth, took a vested interest, liable to be divested by the birth of a daughter of *Mary Doyle*. *Trafford v. Ashton (a)*; *West v. The Lord Primate of Ireland (b)*.

The accumulation is valid at common law, and does not come within the *Thellusson Act*, 40 *Geo. 3, c. 98*: *Morgan v. Morgan (c)*.

Mr. *Kinglake*, for a trustee.

Mr. *Lloyd*, for the second daughter, who claimed to be the eldest daughter, within the terms of the will, contended that the interest to *Georgiana Augusta* was not vested.

Mr. *Moore*, for Sir *John M. Doyle*, cited *Haley v. Bannister (d)*; *Ellis v. Maxwell (e)*; *Longdon v. Simson (f)*.

Mr.

(a) 2 *Vernon*, 660.

(b) 3 *Bro. C. C.* 148.

(c) 20 *Law J. (N.S.) Ch.* 109, 441.

(d) 4 *Mad.* 275.

(e) 3 *Beav.* 587.

(f) 12 *Ves.* 295.

1852.      Mr. *Cairns*, for an incumbrancer on Sir *J. M. Doyle's*  
 {  
   BRYAN      interest.  
   v.  
 COLLINS.    Mr. *R. Palmer*, in reply.

*The MASTER of the ROLLS* said he would look into the cases.

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May 24.      *The MASTER of the ROLLS.*

The second daughter contended, that this was not a vested interest in the eldest daughter of Mr. *Bryan*, unless and until she survived *Mary Doyle's* death without issue; but this point I disposed of at the hearing, having no doubt but that the interest in the eldest daughter of Mr. *Bryan* was vested on her birth, liable, however, to be divested on the birth of a daughter to *Mary Doyle*.

The next point, which is one of difficulty and importance, and on which I reserved my judgment, was raised on behalf of Sir *John Milley Doyle*, who is entitled to the residue of the testatrix's estate. It was contended by him, that assuming the accumulation for the period ending the 22nd of *September* 1830 to be good, which he admits it to be, any accumulation beyond that period is void under the statute, and falls into the residue.

The question discussed was, whether this case comes within the exception contained in the statute. The words of the statute, so far as relate to this question, are these:—By the first clause, omitting the superfluous words, “an accumulation of the profits of personal estate is prohibited, for any longer term than during the respective minorities of any persons, who, under the trusts of the will directing such accumulations, would,  
 for

for the time being, if of full age, be entitled to the interest so directed to be accumulated."

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In the case of *Haley v. Bannister* (a), Sir John Leach held, that the statute prevented an accumulation of interest during the minority of an unborn child ; or, in other words, that the statute referred only to the minority or successive minorities of persons in existence at the time when the will came into effect ; and this same point is affirmed and extended in *Ellis v. Maxwell* (b).

In the view which I have taken of this case, the statute has not, in the events which have happened, any immediate bearing either for or against the Plaintiff ; but, in order to make the grounds of my decision clear, it is necessary for me to state what I consider the statute to have enacted. It is manifest, that, *by operation of law*, an accumulation may legally take place for a period exceeding twenty-one years ; as when a legacy is given to *A.*, an infant, to accumulate till he attains twenty-one, and to be paid to him with such accumulations on his attaining that age, but if he die under that age, to be paid with the accumulations to the eldest son of *B.* then living. If, in this case, the first legatee should die just before attaining twenty-one, and the eldest son of *B.* should at that time be an infant of very tender years, with a father alive of ability to maintain him, practically, the accumulations directed by the will to continue till *A.* attained twenty-one will go on till the eldest son of *B.* attains twenty-one, and possibly, therefore, for a period exceeding twenty-one years ; but this latter accumulation is not directed by the will, nor does it take effect by force of its provisions, and therefore

By operation of law, an accumulation for more than twenty-one years may legally take place.

(a) 4 Madd. 275.

(b) 3 Beav. 587.

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COLLINS.

fore it is urged, that it is not touched by the statute, which affects the validity of accumulations, so far only as they take effect under and by virtue of the provisions contained in some deed or will; and it is contended, that even if the will had directed that, which would have taken place without any such direction, by reason of the operation of the law relative to infants and independently of any such direction, this cannot be affected by the statute according to the clear and rational construction to be put on the words there used. But a great distinction exists between the incidents affecting such an accumulation, made by operation of law, and one made under a direction, if valid, contained in the will. In the former case, it is the property of the infant, and might, if necessary, be applied for his maintenance or advancement; but, in the latter case, it could not be touched until he attained the age of twenty-one years.

In the present case, the accumulations are directed by the will to continue till the eldest daughter of *Mary Doyle* attains twenty-one or marries. No such daughter existed at the date of the death of the testatrix.

If a daughter had been subsequently born, and had attained the age of twenty-one years, the excess of accumulation beyond the twenty-one years, according to *Haley v. Bannister*, would have gone to the residuary legatee. No daughter did, in fact, ever exist, in which case it is given to the eldest daughter of *George Bryan*, jun.; and if it had been previously ascertained that *Mary Doyle* never would have had any daughters, as in the case of her death without issue, before the eldest daughter of Mr. *Bryan* attained twenty-one or married, that daughter would have been entitled to this legacy, at latest, on attaining that age. If that event had occurred, it is also I think clear, from the previous decisions

decisions to which I have referred, that the accumulation during the period which elapsed from twenty-one years after the death of the testatrix till *Georgiana Augusta* attained twenty-one, that is, from the 22nd of *September* 1830, till the 9th of *February* 1842, would have been void under the statute, and would have gone to the residuary legatee. That is, in other words, the amount of the legacy to be paid to *Georgiana Augusta* would, by the effect of the statute, have been ascertained on the 22nd of *September* 1830, but, by the effect of the will, it would not have been payable to her till the 9th of *February* 1842.

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COLLINS.

The question I have to consider is, in my opinion, on principle the same as if *Georgiana Augusta* were now alive and asking for payment of this legacy. What is it that she would be entitled to? In my opinion, if that event had occurred (it being then ascertained by the fact of *Georgiana Augusta* having survived *Mary Doyle's* death without issue, that if the events could have been foreseen, *Georgiana Augusta* would have been entitled, on attaining twenty-one, to payment of the legacy, the amount of which was ascertained to be the sum of 1,400*l.*, together with the accumulations up to the 22nd of *September* 1830), she would now be entitled to receive payment of that legacy so ascertained, and simple interest upon it from the time it became payable, that is, from the period of her attaining twenty-one.

If I am right in the opinion I have formed, that she would have been so entitled, then I am of opinion, that the Plaintiff, being the legal personal representative of *Georgiana Augusta*, is entitled to a similar payment of the principal, and to interest on the legacy from the period when it would have been payable to her; and that period, in my opinion, is the death of the

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eldest daughter, *Georgiana Augusta*; because, if I am right in holding that the legacy was vested in her, and if the fact of *Mary Doyle* never having any daughter had been ascertained previously to the decease of *Georgiana Augusta*, her legal personal representative would have become entitled at the time of such decease to receive the legacy. By operation of law, in the absence of any direction contained in the will, the legatee would be entitled to receive the principal of the legacy, together with interest upon it at four per cent. from the time when it became payable. The legacy here, if *Mary Doyle* had previously died, would have been payable in *October* 1827, when *Georgiana Augusta* died, and the amount of that legacy would have been the 1,400*l.* consols, together with the accumulations up to that period. If, from any accidental or other cause, the payment of the legacy had been postponed till a later period, the sum due to the Plaintiff would have been the amount of the legacy so ascertained, together with simple interest at four per cent. upon that amount, from that period up to the time when the payment was actually made.

In determining this point, it has appeared to me to be essential to bear in mind, how much of the accumulations has arisen from the provisions of the will, and how much by the operation of the rules of law, as administered by this Court, wholly independent of the will.

By the directions contained in the will the legacy was to accumulate until it became payable. If *Mary Doyle* had died shortly after the decease of the testatrix, no question would have arisen upon it. In that case the legacy would have accumulated until the death of *Georgiana Augusta*, and would then have been paid to her legal personal representative; and this appears to me to be the rule applicable to this case, one which, in truth,

truth, neither gives the accumulations for the whole period that they have been accruing, nor for any greater period than that allowed by the statute; but which, ascertaining what the amount of the legacy was at the time when, from subsequent events, it appears that it was payable or might have been paid, gives simple interest from that period up to the time when it is actually paid, subject to which deduction, the surplus accumulations belong to the residuary legatee.

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COLLINS.

In this case, the postponement of the payment was inevitable, because it could not be ascertained until the death of *Mary Doyle*, that the legacy then vested in the eldest daughter of Mr. *Bryan* would not have become divested by the birth of a daughter to *Mary Doyle*; but the same principle appears to me to apply, as it would do in the case of an executor, who, without any direction contained in a will, had accumulated, for several years, the property of a testator at compound interest. In that case, the residue, after payment of the debts bearing interest, and after payment of the legacies with interest at four per cent. from the period of one year after the death of the testator, would belong to the residuary legatee; nor could the creditors or the pecuniary legatees claim any portion of it, although, in fact, it would in part have been produced by the money applicable to the payment of the debts and legacies, which, though payable previously, had not been paid.

This is, I think, the point decided in *Morgan v. Morgan (a)*. In that case, a legacy of 5,000*l.* was given to accumulate, and to be paid to two ladies on their marriage; the residue was given to one for life, with remainder to another absolutely. The ladies never married, and survived the legatee for life of the residue.

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(a) 20 *Law J. (N. S.) Ch.* 109, 441.



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BRYAN  
v.  
COLLINS.

A question arose between the executor of the legatee for life and the legatee in remainder of the residue. The V. C. *Knight Bruce* held, that as, in the events which occurred, if they could have been foreseen, the 5,000*l.* would have formed part of the residue, the executor of the legatee for life of the residue was entitled to simple interest on that legacy for the life of that legatee, but that the rest of the accumulation belonged to the residuary legatee in remainder.

The principle on which I have acted here is clearly there enunciated. In truth, if this legacy had been given, in case *Mary Doyle* had no daughter, to the eldest daughter of Mr. *Bryan* for her life, and, after her decease, to the second daughter of Mr. *Bryan*, this very question would have arisen between the second daughter and the representatives of the eldest daughter.

The result is, that, in my opinion, it is proper to declare, that the Plaintiff, as the legal personal representative of the eldest daughter of Mr. *Bryan*, is entitled to payment of the legacy of 1,400*l.* three per cent. consols, together with the accumulations produced thereby up to and including the 19th day of *October* 1827, together with interest at four per cent. per annum on the amount so ascertained up to the time of payment; and declare that the rest of the accumulations arising from the 1,400*l.* forms part of the residuary estate of the testatrix, and that the Defendant Sir *John Milley Doyle* is entitled thereto, and the rest of the decree must be framed to carry that declaration into effect.

The difficulty in this case having been created by the testatrix, and the legatee having necessarily been compelled to come hither to obtain the legacy, the costs of all parties must be paid out of the residue of the estate, that is, out of the rest of the accumulations.

1852.

## AYLES v. COX.

May 3.

SOME property was sold by auction in this suit. Lot 10, a cottage, and about three acres, was described as "being copyhold of the same manor" (*Dovercourt*); and Lot 11 was similarly described.

Property, sold as copyhold, turned out to be partly freehold. Held, that the vendor could not compel a specific performance, and that special conditions, providing that errors in the description should not invalidate the sale, and for a compensation, did not alter the case.

By the fifth condition of sale, it was provided as follows:—"That if any mistake or error be made or discovered in the description of the premises, or any other error whatever shall appear in the foregoing particulars, such mistake or error shall not annul the sale, but a compensation or equivalent shall be given or taken, as the case may require; such compensation or equivalent to be settled by the Master, in case the parties differ."

*Benjamin Johnson* became the purchaser of Lot 10, for 465*l*.

By an order of the Court, it was referred to the Master, to inquire whether a good title could be made to the premises comprised in Lot 10.

In the Master's office, it turned out, that Lot 10 was partly *freehold* and partly copyhold; and Lot 11, instead of being copyhold, was wholly freehold.

The Master reported that a good title could not be made to the premises comprised in Lots 10 and 11; and the Plaintiffs took exceptions, insisting that the Master ought to have found, that a good title could be, and had been, made out to both lots.

Mr.

1852.

AYLES  
v.  
COX.

Mr. *R. Palmer* and Mr. *Waller*, for the Plaintiff, argued, that though the Court would not force a copyhold estate on a purchaser who had bought it as freehold, still that the converse did not hold good, for freehold tenure was far better than copyhold. Secondly, that the misdescriptions had been provided for by the conditions of sale. They cited *Twining v. Morrice* (a); *Leslie v. Thompson* (b).

Mr. *Grenside*, *contra*.—A purchaser is not bound to take an estate of a different tenure from that which he has contracted for. There are persons who prefer copyhold to freehold; and the purchaser may say, “it is my humour.” He cited *Sugden’s Vendors and Purchasers* (c); and see *Dart’s Compendium*, &c. (d).

*The MASTER of the ROLLS.*

The fifth condition of sale, which provides for compensation, is inapplicable, when the thing sold turns out to be of a different nature from that contracted to be sold. The contract is different, and I am of opinion, in this case, that the thing proposed to be forced on the purchaser is different from that sold. The fifth condition would apply, if the property had turned out to be larger or smaller than represented in the conditions of sale, but not when the property sold is totally different from that which the vendor has.

It is impossible to enter into a consideration of the different motives which may induce a person to prefer property of one tenure to another. The motives and fancies of mankind are infinite; and it is unnecessary

(a) 2 *Bro. C. C.* 331.  
(b) 9 *Hare*, 268.

(c) Page 298 (9th edition).  
(d) Page 569 (2nd edition).

sary for a man who has contracted to purchase one thing to explain why he refuses to accept another.

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AYLES

v.

Cox.

The sale was of copyhold, and the reference to the Master was to inquire into the title to copyhold property; and it turns out to be freehold. I am of opinion, that the vendor cannot compel the purchaser to complete his contract.

The exceptions must be overruled.

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BAINBRIDGE v. CREAM.

May 1.

THE testator gave his freeholds and leaseholds to his wife, *Mary Ann Cream*, for life; but if she married again, then he revoked the gift. And from and immediately after the decease of the said *Mary Ann Cream*, or her second marriage, whichever event should first happen, the said testator gave and bequeathed a leasehold messuage to trustees, in trust to sell. And as to the monies to arise, he directed his trustees to pay the costs, and then divide and pay the residue or surplus of such monies unto and equally between and amongst his nephews and nieces following [naming them], "or such of them as shall be living at the decease of my wife *Mary Ann Cream*, to take *per capita*, and not *per stirpes*."

Bequest to A. during widowhood, and immediately after her death or second marriage, whichever event should first happen, to trustees to sell and divide between several persons named, or such of them as should be living at the death of A.. A. married again. Held, that the property thereupon became immediately distributable.

The testator died in 1848; his widow married again in 1850, and thereupon the trustee sold the property.

The principal question raised by this special case was, whether the testator's nephews and nieces were entitled to be paid their respective shares of the proceeds

1852. proceeds of the sale, notwithstanding the testator's widow was still living.

BAINBRIDGE

c.

CREAM.

Mr. *Cole*, for the Plaintiff, the trustee, cited *Sturgess v. Pearson (a)*; *Masters v. Scales (b)*; *Wagstaff v. Crosby (c)*.

Mr. *W. W. Cooper*, for the adult legatees.

Mr. *Speed*, for the infant legatees.

The MASTER of the ROLLS held, that the fund was now divisible.

*a)* 4 *Madd.* 411.

*(b)* 13 *Beac.* 60.

*(c)* 2 *Coll.* 746.

May 1.

DONALD v. BATHER.

In a suit for administration against the administrator, with the will annexed, and the widow, to whom the assets had been assigned, such administrator was alleged and proved to be out of the jurisdiction.

Held, that the suit could not proceed in the absence of a legal personal representative.

**G**EORGE BATHER, the administrator with the will annexed of the testator, was alleged to have assigned the assets to the Defendant *Elizabeth Bather*, the widow.

This bill was filed against the widow and the administrator, for the administration of the estate; but the administrator was alleged and proved to be out of the jurisdiction, and process was prayed against him when he should come within the jurisdiction. He did not now appear.

Mr.

Mr. *Roupell*, for the Plaintiff.

1852

Mr. *Giffard* objected, that the suit could not proceed in the absence of the legal personal representative of the testator. He insisted that an administrator *durante absentia* ought to have been obtained under Simeon's Act (a). He cited 3 *Bacon's* Abridgment (Executors and Administrators, G.) (b); 1 *Williams* on Executors (c).

DONALD  
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Mr. *Roupell*, in reply.—The administrator is a party to the suit, for the bill prays process against him when he shall come within the jurisdiction. This sufficiently accounts for his absence; and where the suit is to prevent waste, and preserve the assets, the Court has jurisdiction to interfere.

*The MASTER of the ROLLS.*

The cause must stand over: I am satisfied, that in its present state, the suit cannot proceed in the absence of the legal personal representative.

(a) 38 *Geo. 3*, c. 87.

(c) Page 314, 1st edition.

(b) Page 482.

*Re* STRAFORD.

June 11, 12.

LADY *RICKETTS* and Mr. *Straford* (a solicitor) were the executors of the will of the testator, and *Straford* and *Charnock* were the trustees. Under this will, the Petitioner, Sir *Cornwallis Ricketts*, was interested in the testator's estate in remainder. After the testator's death, considerable litigation took place in respect of the testator's property, both in this and in the Ecclesiastical Court. In these proceedings Mr. *Straford* acted as solicitor, and in March 1852 he delivered to Lady *Ricketts* six bills of costs, of which

The taxation under the 38th section, or the "third party liable clause," is by order of course; but, under the 39th section, or third party interested clause, the application is special.

1852. which the fourth had reference to an indictment for  
 Re perjury.  
 STRAFORD.

Sir *Cornwallis Ricketts* presented this special petition, stating, amongst other things, "that the trustees and executors of the said testator are not, nor is his estate, properly chargeable with any part of the fourth-mentioned bill," and even if chargeable therewith, the bill contains many improper charges.

Mr. *Roupell* and Mr. *Elderton*, in support of the petition.

Mr. *R. Palmer* and Mr. *T. H. Hall*, *contrà*, objected, that the order ought to have been obtained as of course, and that a special petition was improper (*a*); and, secondly, that the fourth bill ought not to be taxed, unless the Petitioner admitted his liability to pay it.

*The MASTER of the ROLLS*.—I will make inquiry.

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June 12. *The MASTER of the ROLLS*.

In this case no common order could have been granted. The case falls within the 39th section, and not under the third party or 38th section.

The Court, under the 39th section, is to order a taxation, "with such directions and subject to such conditions" as the Court shall think fit, and must "take into consideration the extent and nature of the interest of the party making the application."

I shall make the common order, reserving the costs.

(*a*) 6 & 7 *Vict. c. 73, ss. 38, 39.*

1852.

## DAWSON v. BOURNE.

June 5.

**T**HE testator expressed himself as follows :—" I give all the rest, residue, and remainder of my property, of what nature or kind soever, to be equally divided between my nieces *Jane Dawson* and *Mary Dawson*, and I confine my said legacies hereinbefore-mentioned, to be given to my nieces *Jane Dawson* and *Mary Dawson*, and *their children*, without comprehending their husbands, unless they, my said last-mentioned nieces, or either of them, should die without issue."

A testator bequeathed his residue to his nieces *A. & B.*, and he then confined the gift to *A. & B.* and their children, without comprehending their husbands unless his nieces should die without issue. Held, that *A. & B.* took for their separate use for life, with remainder to their children, and that in default, the nieces took absolutely.

The question was as to the proper construction of this clause in the will.

Mr. *C. P. Cooper* and Mr. *Nichols*, argued, that the nieces took absolute interest. They cited *Wild's Case* (a); *Stokes v. Heron* (b).

Mr. *Southgate*, *contra*, was not heard.

*The MASTER of the ROLLS.*

I am of opinion, that the only way to give effect to these words is, to give the residue between the nieces equally for their separate use for life, and after their deaths to their children, and if they have no children then it will belong to the nieces absolutely.

(a) 6 Co. 16.

(b) 12 Cl. & Fin. 161.



1852.

June 12.

SANER v. DEAVEN.

On the death of one of several co-Plaintiffs, it was ordered, that the survivors should revive within a limited time, or that the bill should be dismissed, notwithstanding there was no legal personal representative, it being their duty to obtain administration.

THE cause being called on upon the 23rd of *March*, it was stated, that one of the three co-Plaintiffs was dead, and that the suit had abated.

Mr. *Beales* now moved, that the surviving Plaintiffs might file a bill of revivor, or take other necessary proceedings within a limited period, or that the bill might be dismissed. He cited *Chichester v. Hunter* (a).

Mr. *Terrell*, *contrd*, stated, that there was no personal representative, and it would therefore be impossible to revive.

*The MASTER of the ROLLS.*

The usual order must be made. Assuming that there is no legal personal representative, the surviving Plaintiffs must take proceedings to obtain administration.

(a) 3 *Beav.* 491.

1852.

## ROBERTS v. BERRY.

Nov. 16.

**T**HE Plaintiffs put up some freehold property for sale, and part of it was purchased by the Defendant on the 22nd of *July* 1852.

By the third condition, the purchaser was to pay down a deposit of 20 per cent., and the remainder of his purchase-money on or before the 8th of *August* next, at which time the purchase was to be completed; but if, from any cause, the purchase was not then completed, interest was to be paid on the residue of the purchase-money.

By the fourth condition, the abstract was to be delivered within seven days from the sale, and the purchaser was to deliver objections within eight days from the receipt of the abstracts, and all objections, not made within that time, were to be taken to be waived. The vendors also reserved the right to rescind the contract, if the objections should be such as to make it advisable.

On the 24th of *July*, the Defendant wrote and required the abstract, but which was not delivered until the 3rd of *August*. The Defendant thereupon gave notice to rescind the contract, on the ground that the abstract had not been delivered according to the conditions of sale, and he commenced an action for the recovery of the deposit. The vendors filed this bill for specific performance.

The not of the essence of the contract, and a demurrer to a bill by the vendors for specific performance was overruled by the Master of the Rolls and Lords Justices.

The time specified for the delivery of the abstract, held, in equity, not to be of the essence of the contract.

On a sale on the 22nd *July*, the conditions provided that the abstract was to be delivered within seven days, and objections taken within seven days after the delivery, or be deemed waived; and the purchase to be completed on or before the 8th of *August*. The abstract was not delivered until twelve days after, and the purchaser wrote to rescind the contract. Held, that in equity the time for delivery was

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The bill stated, that the title-deeds were in the possession of a mortgagee, who being absent on the Continent, the abstract could not at once be furnished.

To this bill the Defendant demurred.

Mr. *R. Palmer* and Mr. *J. H. Palmer*, in support of the demurrer, argued, that as at law time was essential, so it must be in this Court, where it was sought to enforce a mere legal contract, and that such was the opinion of Lord *Cranworth* in *Parkin v. Thorold* (a).

Mr. *K. Parker* and Mr. *W. H. Clarke*, *contra*.

The MASTER of the ROLLS said, that this case was similar to, and governed by, his decision in *Parkin v. Thorold*. That he must decide in conformity, and overrule the demurrer.

(a) 2 *Sim. (N. S.)* 1; and *post*, p. 59.

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Affirmed by the Lords Justices, *Jan.* 20, 1853.

Nov. 11.

LANGFORD v. MAY.

Where the common injunction had been obtained prior to the Act 15 & 16 *Vict. c. 86*, and the answer came in; Held, that the proper practice was to give notice of motion to dissolve.

THE common injunction was obtained prior to the 15 & 16 *Vict. c. 86*, s. 58, coming into operation, which assimilates the practice respecting common injunctions to that in respect of special injunctions.

On the 4th of *November*, the usual order *nisi* to dissolve was made, and the question was as to the practice.

Mr. *J. V. Prior* and Mr. *Bazalgette*, for the different parties.

The MASTER of the ROLLS.—I think the proper course is, to give notice to dissolve the injunction. The matter must, therefore, stand over until the next seal.

1852.

DUBERLEY v. DAY.

March 17.

April 1.

**T**HIS case came on upon exceptions. The facts were as follows:—In 1812, and prior to her marriage, Mrs. *Golborne* was possessed of the Rectory and Rectorial Tithes of the parish of *Witcham*, held of the Dean and Chapter of *Ely* for a term of twenty-one years, renewable from time to time, upon certain terms and conditions, which did not affect the question in this case. This property was, in consideration of the marriage and before its solemnization, settled, by an indenture bearing date the 21st of *April*, 1812, in the following manner, viz. for the separate use of the wife during the joint lives of herself and her husband, and in case there should be issue of the marriage (which event occurred), in the following manner, viz. in case she survived her husband, the absolute interest in the reversion was vested in her, and her executors, administrators and assigns, but in case she died before her husband, the property was to go to the husband for life, with remainder to the issue of the marriage. The marriage took effect.

A husband may make a valid assignment of his wife's reversionary interests in leaseholds, but *secus*, if the interest be of such a nature that it cannot by possibility vest in the wife in possession during the coverture.


A wife's leaseholds were, on her marriage, limited to her absolutely in the event of her surviving her husband, but without any trust for her separate use. Held, that the husband could not, during the coverture, dispose of this contingent reversionary interest of his wife in the term.

By indentures dated in 1838, 1839, and 1842, the husband, Mr. *Golborne*, professed to convey the reversion in this term to secure various sums of money, advanced to him in consideration of such charges. The wife joined in these conveyances, and as far as she could, (in the absence of statutable acknowledgment,) professed

DATES.

1812. Settlement.  
1838. } Charges.  
1839. }

1842. Charges.  
1847. Death of Husband.

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professed to create and to give effect to these charges. This circumstance was admitted to be immaterial, as she could not bind her interest by merely joining in such conveyances, and accordingly, the Court considered, that her concurrence might be wholly disregarded in the determination of the question. There was issue of the marriage: the husband died in 1847, the wife survived him; and unless these deeds created valid and effectual charges, she became entitled absolutely to the property comprised in the term in question. The Master having reported that these deeds did not create effectual charges upon this property, exceptions were taken to his finding, insisting that it was erroneous.


Mr. *Stuart*, Mr. *K. Parker*, and Mr. *Hardy*, in support of the exceptions.

The doctrine as to the husband's power over his wife's reversionary interest in *choses in action*, as stated in *Purdew v. Jackson* (a), has no application to a wife's chattels real. Over the chattels real of his wife a husband has an absolute power of disposition, but over her *choses in action* he has but a mere qualified power of reducing them into possession. This is explained in *Mitford v. Mitford* (b), "What interests survive to the wife in equity in general, is determined by analogy to the rules of law. As at law her *choses in action*, not reduced into possession by the husband, survive to her, so do her equitable interests in the same case survive to her in equity. But there are some legal interests which do not admit or stand in need of being reduced into possession, being in possession already, and not lying in action; as terms for years and other chattels real; of which the legal title is in the wife. They will survive if

(a) 1 *Russ.* 1.

(b) 9 *Ves.* p. 98.

if no act is done by him: but he may assign them; which passes the legal interest, whether with or without consideration. The analogy is followed in equity. Equitable interests of the same description may be transferred in the same manner."

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So in *Purdew v. Jackson* (a), the *Master of the Rolls* observes, "It is further said, that the possibility of a term belonging to the wife may be released by the husband; and that the same doctrine must apply to her future *chose in action*. But if there be any weight in the opinion of a very great Judge, all that relates to chattels real, as terms for years, &c., and to the power of the husband in right of his wife over that species of property, ought to be put aside, as having, in strict reasoning, nothing to do with the subject."

He proceeds (p. 51): "to cite cases or dicta concerning terms of years can serve no end, except to draw off our attention from the point before us to a subject totally different; for the interest in a term of years is not a *chose in action*; it is a legal interest, which does not lie in action, and may pass by assignment."

He subsequently adds (p. 65), "The argument appears to me to have been entangled, by mixing with it the consideration of the husband's interest in and power over the wife's property of a different kind; by borrowing sometimes the principles which apply only to her chattels real, such as terms for years, &c., where the husband has an interest in his wife's right, and an absolute power of disposal to be exercised by him in his lifetime; and sometimes the principles which govern in the case of the wife's personal chattels in possession, of  
 which

(a) 1 *Russ.* p. 50.

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which marriage confers the absolute and unqualified right on the husband. The doctrine that belongs to these species of property has no application to personal chattels not in possession, but lying in action and being mere *choses in action*."


It has long been settled, that a husband may assign his wife's equitable interest in a term, Sir *Edward Turner's Case* (a), referred to in *Hanson v. Keating* (b), *Hunt v. Pit* (c). But *Donne v. Hart* (d) decides this case. In that case, it was held, that the contingent reversionary interest of a wife in a term of years may be assigned by her husband, and there the husband died before the happening of the contingency. That case was approved of by Sir *Edward Sugden* in *Box v. Jackson* (e). He says, "I am glad to observe, however, that in the cases of *Donne v. Hart* (f) and *Major v. Lansley* (g), the Court has refused to extend the doctrine to chattels real. I think the doctrine has been already carried far enough, and ought not to be extended."

In *Doe d. Shaw v. Steward* (h), it was held, that the assignees in bankruptcy of the husband were entitled to the wife's contingent reversionary interest in a term. Mr. *Butler*, it is true, in his note to *Coke on Littleton* (i), seems to think that "if a lease be made to the husband and wife during their lives, with remainder to the executors of the survivor, and the husband disposes of the term, the disposition will not bar the wife, for during the coverture she had a mere possibility only." But he afterwards states, in a later edition, that the authority of the

(a) 1 *Vern.* 7.  
 (b) 4 *Hare*, 3, n. (b).  
 (c) *Freeman's C. C.* 78.  
 (d) 2 *Russ. & Myl.* 360.  
 (e) *Drury*, p. 84.

(f) 2 *R. & M.* 360.  
 (g) 2 *R. & M.* 355.  
 (h) 1 *Ad. & Ell.* 300.  
 (i) Page 351 a.

the husband has been considerably modified by equity. The law thus stated in the note, that a possibility of the wife cannot be assigned by her husband, is inconsistent with *Donne v. Hart* (a). The Duke of *Chandos v. Talbot* (b), *Grey v. Kentish* (c), *Theobalds v. Duffoy* (d), *Lyde v. Mynn* (e), *Fearne's Contingent Remainders* (f), were also cited.

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Secondly, it will be said, that it is contrary to the contract between the parties to the settlement, that the husband should dispose of an interest thereby provided for the wife if she survived her husband. It is not like her life estate, which is settled to her separate use, and there is nothing to prevent the husband's disposing of it. If this contract rested on articles or were executory, the Court might possibly say, that the intention was, that the husband should have no power over it; but this is a legal executed contract, with legal limitations, containing no recital of any such agreement, nor any such restriction, and, until it has been reformed, it must be construed according to its expressed terms, and not by conjecture.


The law only recognizes one way of excluding a husband's right over his wife's property, which is by limiting it to her separate use, *Davies v. Thornycroft* (g), *Massey v. Parker* (h).

Mr. *Shapter*, for other parties, cited 8 & 9 *Vict. c.* 106, s. 6; *May v. Roper* (i).

Mr.

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| (a) 2 <i>Russ. &amp; M.</i> 360.    | (e) 1 <i>Myl. &amp; K.</i> 683. |
| (b) 2 <i>P. Wms.</i> 607.           | (f) 8th edition, 549.           |
| (c) 1 <i>Atk.</i> 280.              | (g) 6 <i>Sim.</i> 420.          |
| (d) 9 <i>Mod.</i> , and stated in 3 | (h) 2 <i>Myl. &amp; K.</i> 181. |
| <i>Russ.</i> 79, n.                 | (i) 4 <i>Sim.</i> 360.          |



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Mr. *Lloyd* and Mr. *Toller*, in support of the Master's report. First, a possibility belonging to a wife, which cannot fall into possession during the coverture, cannot be alienated by her husband. This is distinctly stated in the note to *Coke on Littleton*(a). Again, Mr. *Preston* states, "It is observable, however, that if the wife have a possibility of a term (b), which cannot, by any means, vest in the husband during coverture, the husband's release or other disposition will not affect her; but he and his wife together may bind this possibility by a fine *sur concesserunt*." And in Mr. *Jarman's Edition of Bythewood* (c), there is a distinction between a possibility which may accrue during the coverture, and one which cannot, *Dalbiac v. Dalbiac* (d). In *Donne v. Hart* (e), the contingency might have happened during the marriage, and therefore that authority does not govern the present case. At law a possibility cannot be assigned, though it might be barred by a fine. It is, however, assignable in equity; but the Court will not aid a husband in depriving his wife of a reversionary provision provided for her benefit, *Richards v. Chambers* (f), *Whittle v. Henning* (g).

So the law is stated by Lord *Holt* in *Gage v. Acton* (h). He says, "Where the wife hath any right or duty which, by possibility, may happen to accrue during the coverture, the husband may, by release, discharge it; but where the wife hath a right or duty which, by no possibility, can accrue to her during coverture, the husband cannot release it."

Secondly.

(a) Page 351 a, 19th edition.  
 (b) 1 *Abstracts*, 343, citing  
*Wing. Max.* 213, pl. 13; 10 *Rep.*  
 51 a; 1 *Inst.* 46 b, 351 a; 9  
*Mod.* 104.  
 (c) Vol. 9, p. 11 (2nd edition)

(d) 16 *Ves.* 122.  
 (e) 2 *R. & M.* 360.  
 (f) 10 *Ves.* 580.  
 (g) 11 *Beav.* 222, and 2 *Phil-*  
*lips*, 731.  
 (h) 1 *Salk.* 326.

Secondly. By the terms of his contract, the husband was precluded from defeating the provision contracted for by his wife prior to the marriage. The property being the wife's, the husband and the wife, being then respectively *sui juris*, agreed that it should be conveyed to trustees, upon the trusts after declared. The wife says, "If I survive you, I stipulate for the property absolutely; but if you survive me, you shall have a life estate only in it." How can the husband, in the face of this contract, contend, that the instant after his marriage he may defeat the provision contracted for by his wife out of her own property, and by assignment subvert his own contract?

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The effect would be, to give him a greater interest, in case his wife survived him, than he would have if he were the survivor.]

If the husband and his assignees are compelled to seek the assistance of this Court, they must do equity on their side, *Sturgis v. Champneys* (a).

Mr. *Stuart*, in reply. The text writers are no authority. They are all copied from Mr. *Butler's* note, which is unsupported by any decision, and was modified in subsequent editions. If the power of assignment depended upon the interest falling into possession during coverture, *Donne v. Hart* is decisive, for there it did not, and yet the assignment was held valid. Whatever interest the wife had in the term, beyond that settled to her separate use, actually vested in the husband, and he could dispose of it like any other person.

Secondly.

(a) 5 *Myl. & Cr.* 105.

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Secondly. The reversionary interest not being settled to the wife's separate use in the same way as her life estate, the husband's control over it is not affected. The result of the principle contended for on the other side would be, to prevent those parties dealing with their property even to escape starvation.

The MASTER of the ROLLS reserved judgment.

April 1.


The MASTER of the ROLLS.

This case comes on upon exceptions to the Master's report, who has found that the indentures of 1838, 1839 and 1842, do not constitute good and effectual incumbrances upon the estate and interest of Mrs. *Golborne* in certain hereditaments comprised in the settlement of 1812, executed upon the marriage of Mrs. *Golborne* with her late husband. The question to be determined is, whether, having regard to the terms of the settlement of 1812 and the subject-matter of the settlement, the husband can dispose of the reversion of his wife in the chattel real which is the subject of this settlement.

His Honor stated the above circumstances of the case and proceeded :—

The question is, whether the husband could effectually dispose of the wife's reversionary term in a real estate, under an instrument containing limitations to the effect I have above stated. At common law the husband, who is bound to support the wife and to pay all her debts, whether contracted before or during coverture, acquires an absolute interest in all the personal
 chattels

chattels and estate of which the wife is actually possessed, or to which she is entitled at any time during her coverture, with this condition, that, so far as regards her *choses in action*, they must be reduced into possession by the husband, to entitle him to dispose of them. With respect to the real estate of the wife, the husband has no power over it, except that he is entitled to the sums due to the wife for rent during the coverture, and has a contingent interest, as tenant by the curtesy, during his life. Terms of years belong properly to the former class of what is the personal property of the wife.

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It is quite settled, that at law, a husband may dispose of the wife's term which is vested in him, whether the wife's beneficial interest in it is to arise hereafter or immediately. In *Donne v. Hart* (a), the Master of the Rolls decided, that there is no difference in equity between the legal interest in a term and the trusts of a term, and held, that the assignment by the husband of the reversion of the wife in a chattel real was a good and effectual disposition of it, and bound the wife who survived the husband. This has always been since considered to be good law; it has been followed and approved in various cases which were cited to me, and to which I do not consider it necessary more particularly to refer. In these and indeed in most of the modern cases which have any reference to this subject, the distinction between the wife's reversion in chattels personal, that is, in the wife's *choses in action* and her reversion in chattels real or in terms of years, has been carefully maintained, and the distinction ought certainly to be constantly borne in mind in considering cases of this description. And if this were a case resembling,
 in

(a) 2 *Russ. & M.* 360.

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in its circumstances, the case of *Donne v. Hart*, I should certainly follow that case.

A distinction however is taken, in this case, arising from the limitations of the settlement, which is of great importance, although somewhat refined. It is this :— although the general law as stated above is not disputed, it is contended, that the power of the husband to dispose of the reversionary trust term of the wife is confined to those cases where the reversion is so limited, that it might, by possibility, vest in the wife during coverture, but that in those cases, where the term is so limited, that the wife could not, by possibility, take any interest in it during the coverture, there the husband cannot dispose of it. Thus for instance, where a term is limited to the husband during the joint lives of the husband and wife, and then to the survivor of them, or if a term be limited to the wife, in case she survive her husband and upon his death, then it is urged, that as this is an interest which the husband could not enjoy, so it is one that he cannot dispose of. There is no question in the case, that the limitation of the reversion of the wife in the term settled is such that it could not vest in possession during the life of the husband.

This is the main point urged on the part of the wife ; but in addition to it, and to some extent as auxiliary to it, it is further contended, that in this individual case, the frame and scope of the settlement, or what in some cases has been called “the truth and honour of the settlement,” forbid the husband’s disposition of the reversion of his wife in this term. It is, in truth, obvious, on the first perusal of the settlement, that if the doctrine contended for on behalf of the husband and those claiming under him can be sustained, the whole

whole scope and object of the settlement is defeated. The husband has contracted, that in case of there being issue of the marriage and of his surviving his wife, he is to take no more than a life estate in the term, with remainder to the issue of the marriage after his decease; and he has further contracted, that in case there be issue of the marriage and his wife should survive him, she shall take an absolute interest in the hereditaments comprised in the term; and yet, if the doctrine urged on his behalf is to prevail, he will take the absolute interest in the term, although the wife be the survivor, although he has contracted that he is in that event to take nothing, and although, if he himself be the survivor, he will only take a life interest. The cases of *Richards v. Chambers* (a) and *Seaman v. Duill* (a) are cited in support of this view of the case; in which the decision of the *Master of the Rolls* shows, that if an application had been made to this Court to transfer property so settled to the husband, on the consent of the wife, the Court would, notwithstanding such consent, have refused to make any such order.

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I do not, however, consider it necessary to decide this question, inasmuch as I am of opinion, that the distinction above taken is correct, and that the power of the husband to dispose of the reversionary interest of the wife in chattels real depends upon the circumstance whether such interest could have vested in possession during the coverture. I have come to this conclusion, not upon the ground that this reversion was a mere possibility of the wife, and that as such it could not be assigned, which is a doctrine asserted in some of the earlier cases, and countenanced by considerable authority of an older period, but which doctrine is undoubtedly

(a) 10 Ves. 580.

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doubtedly exploded by the later decisions; but I have arrived at this conclusion on the ground, that this is a possibility which could not vest in the husband during coverture, and that a possibility which cannot so vest is not assignable by the husband.

In *Gage v. Acton* (a) Lord C. J. *Holt* held, that “where the wife hath any right or duty which, by possibility, may happen to accrue during the coverture, the husband may by release discharge it, but where the wife hath a right or duty which by no possibility can accrue to her during coverture, the husband cannot release it.” It is true that his opinion was overruled by the other Judges, but the subsequent authorities enforce and confirm his view of this case. I may here observe, that in *Milbourn v. Ewart* (b), Lord *Kenyon* disapproved of the general reasoning of Lord *Holt* in *Gage v. Acton*, though not on this particular point. The question was, whether a bond given by an intended husband to his wife, payable after his death and as a provision for her, was released by the marriage, and Lord *Kenyon* says, “I cannot but lament, that he (Lord *Holt*) had recourse to such flimsy and technical reasonings to enforce a case so directly against law and conscience,” and he adds, “I am glad to find, that, even in that case, the opinions of the two other Judges occasioned a majority against that of Lord *Holt*; and if those two Judges had been of less eminence than Mr. *J. Gould* and Mr. *J. Turton* were, I should not have thought that much deference ought to be paid to the opinion of Lord *Holt* there delivered, which was as repugnant to the rules of law as of equity.” The effect

(a) 1 *Salk.* 326; 1 *Ld. Raym.* 515; 2 *Vern.* 480; *Precedents in Chancery*, 237.
 (b) 5 *Term Rep.* 381.

effect of the decision of Sir *William Grant* in *Dalbiac v. Dalbiac* (a) is similar to the dictum of Lord *Holt*.

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The case, however, which most plainly states and acts on this distinction, is the case of *Doe d. Shaw v. Steward* (b). In that case, the assignees in bankruptcy of the husband claimed the reversion in a term, which was given to the wife after the decease of the husband, or in case he should give up possession of the house, or in case he should mortgage it. It was argued for the wife, that this was a mere possibility which was not assignable by the husband. But on behalf of the assignees, it was contended, that inasmuch as it was a possibility which might vest in the wife during coverture, it was assignable by the husband, and that consequently it passed to his assignees in bankruptcy. And it was, upon this ground and upon this distinction, as it appears to me, that the decision was founded, although it is to be regretted that the grounds of their decision are not so clear and distinct on this subject as might be desired; but as I understand that decision, it was on this principle alone that the assignees were held entitled to recover. It appears also to me, that there is a clear and intelligible principle to be discovered in this doctrine, although, at first sight, it appears to be somewhat refined. As far, also, as I can collect, both from the books and from such experience as I possess in this matter, it has been the practice of conveyancers to recognise and to act upon this distinction. In addition to which consideration I am confirmed in the view I take of this case, by reflecting that in acting upon this distinction, I shall be carrying into effect what was the plain and obvious meaning of the contract entered into on the marriage of the parties.

I am of opinion, therefore, that the Master was right and the exceptions to his report must be overruled.

(a) 16 *Ves.* 116.

(b) 1 *Ad. & Ell.* 300.

1852.

March 10, 29.

IVE v. KING.

April 2.

Distinction between a substitutional gift after a bequest to persons as a class, and one following a gift to individuals *nominatim*.

Bequest to A. for life, and afterwards equally between a number of persons by name, and in case of the death of any of them before A., their respective shares to go to their respective children, and in failure of children to the survivors.

The following

points were decided as to the several original legatees:—First, *Ann* was deceased at the date of the will; Held nevertheless, that her children took by substitution. Secondly, *William* was living at the date of the will, but he died before the testator; Held also that his children took his share, and that the class was to be ascertained at the death of the testator. Thirdly, *Thomas* survived the testator and died in the life of the widow; Held that his children took, but were to be ascertained at *Thomas's* death. Fourthly, it was held, that to entitle a child to take, it was not necessary that he should survive the tenant for life. Fifthly, *Charles* died without issue. Held, that the survivors were to be ascertained at his death, and not at the death of the tenant for life.

Bequest to A. for life, with remainder to B., C. and D., with a substitutional gift of their "respective shares," in case of the death of any of them. Held that B., C. and D. took as tenants in common.

A residue was given to the wife for life, and afterwards in separate moieties to different persons. One moiety was given over "in case of the death of any or either of them *before my said wife*," and the other "in case of the death of any or either of them," without specifying any period. Held, under the circumstances, that the gift over in both cases was to be construed on death "*before my said wife*."

THE testator by his will, dated in 1819, gave a real estate and his residuary personal estate to his wife, for life, which after her death he gave to *Ive* and *Ashton*, in trust to convert into money, and to retain the expenses, and a legacy of 15*l*. He then proceeded to dispose of his residuary estate as follows:—

"And whatever may be then remaining in their hands, I direct may be divided into two equal parts, the one moiety or half share thereof I give in five equal shares: that is, one share to *Elizabeth*, the widow of my late brother *George* [*Deverell*]; one share to my brother *William*; one share to my brother *Thomas*; one share to my sister *Mary Merrick*; and the remaining to my sister *Elizabeth Edwards*. And in case of the death of any or either of them before my said wife *Elizabeth*, then their respective shares to go to their respective husbands or wives, if any, and if not, then to their respective children,

dren, and in failure of children, then to the survivors of them, share and share alike.

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“And the other moiety or half, part thereof I give as follows:—10*l.* thereof to *Ann Edwards*, sister of *Edward Edwards*, should she be then living, as a token of my wife's friendship for her, and the remainder of the said moiety or half part to my wife's sister *Ann Smith*, her brother *Charles King*, her brother *John King*, her brother *Henry King*, and her brother *Thomas King*. And in the case of the death of any or either of them, then their respective shares to their children, if any, and if not, then to the survivors of them, share and share alike.”

The testator died in 1837 and his widow in 1849.

The state of, and changes in, the families of the legatees were complicated, and it is intended to limit the statement to such facts only, as are necessary in order to understand the principle of the decision.

Ann Smith died prior to the date of the will, and she left children, who were still living.

William Deverell died between the date of the will and the death of the testator. He left three children, who survived the testator, but one of them, *William Deverell* the younger, died in the life of the widow.

Thomas Deverell survived the testator and died in the life of the widow, leaving children.

Elizabeth Edwards died in the testator's life; she had two children, *John* and *Thomas*, of whom *John* died in the life of the widow.

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Charles King died without children in the testator's life, and his surviving brothers then were, *Henry King* (who was still living) and *Thomas King*, who died in the life of the widow.

Mr. *Eddis* and Mr. *Browell* for the trustees.

Mr. *Pownall* for the two children of *Elizabeth Deverell*, and the surviving child of *John King*.

First.—The children take by substitution, notwithstanding their parents may have died before the testator: *Smith v. Smith* (a); *Giles v. Giles* (b). The case of *Thornhill v. Thornhill* (c) has been overruled by *Collins v. Johnson* (d).

Secondly.—Those children only can take who survived the widow, *Salisbury v. Petty* (e).

Thirdly.—The second moiety is not given in shares like the first, and therefore the legatees take as joint tenants.

Fourthly.—As to *Ann Smith*, who was dead at the date of the will, her children cannot take by substitution, for she was not capable of taking, *Gray v. Garman* (f). As to that portion there is therefore an intestacy. He also cited *Le Jeune v. Le Jeune* (g), and *Ranelagh v. Ranelagh* (h).

Mr. *Smythe*, for *Thomas Edwards*, the surviving son of

(a) 8 Sim. 353.

(b) 8 Sim. 360.

(c) 4 Mad. 377.

(d) 8 Sim. 356, n., and 4 Law
J. (N. S.) Ch. 226.

(e) 3 Hare, 93.

(f) 2 Hare, 268.

(g) 2 Keen, 701.

(h) 2 Myl. & K. 441.

of *Elizabeth Edwards*, contended, that those children only took by substitution who survived the tenant for life(a); and that as a class of children they took as joint tenants. That *John Edwards*, therefore, who died before the widow, took no part of the legacy. He cited *Cripps v. Wolcott* (b).

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Mr. *Fane*, for the personal representatives of *John Edwards*, the son of *Elizabeth Edwards*, who died in the life of the widow.—The children took a vested interest on the death of their parents, and although they died in the life of the tenant for life, their representatives became entitled to receive their shares: *Lyon v. Coward* (c); *Masters v. Scales* (d). Secondly, they took as tenants in common, for “the Court decrees a tenancy in common as much as it can:” *Jolliffe v. East* (e).

Mr. *Baggallay*, for *Henry King*, the only original legatee who survived the tenant for life, argued, that the children of *Ann Smith* could not take, because their parent was dead at the date of the will, and that the second moiety was at all events divisible into fourths. Secondly, that the second moiety was given in joint tenancy, and that the whole belonged to *Henry* by survivorship. He cited *Christopherson v. Naylor* (f); *Tytherleigh v. Harbin* (g); *Gray v. Garman* (h); *Thornhill v. Thornhill* (i); *Waugh v. Waugh* (k).

Mr. *H. C. Jones*, for the children of *Henry King*,
cited,

- (a) 2 *Jarman on Wills*, 105.
- (b) 4 *Madd.* 11.
- (c) 15 *Sim.* 287.
- (d) 13 *Beav.* 60.
- (e) 3 *Bro. C. C.* 27.

- (f) 1 *Mer.* 320.
- (g) 6 *Sim.* 329.
- (h) 2 *Hare*, 268.
- (i) 4 *Madd.* 377.
- (k) 2 *Myl. & K.* 41.

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cited, in addition to the other authorities, *Crowder v. Stone* (a); *Leeming v. Sherratt* (b).

Mr. *Sidebottom*, for the children of *Ann Smith*, who died three years before the testator, relied on *Jarvis v. Pond* (c); *Bebb v. Beckwith* (d); and argued, that the children were equally the objects of the testator's bounty, whether their parents were living or dead.

Coulthurst v. Carter (e) and *Edwards v. Edwards* (f) were also referred to during the argument.

The MASTER of the ROLLS.

Upon most of the various points which have been argued, I intend to reserve my judgment, as the same points are under my consideration in *Coulthurst v. Carter*; but on one point, I may now express my opinion.

As to the second moiety of the residue, I think there is a tenancy in common, and not a joint tenancy. It is given to *Ann Smith, Charles King, John King, Henry King* and *Thomas King*, but it is evident that the testator intended them to take distinct and separate shares, for he goes on to direct, that in case of the death of any of them, "*their respective*" shares shall go to their children, &c. It is clear, therefore, that he intended each to take one-fifth, in the same manner as he had given the other moiety, and that they were to take share and share alike. I am of opinion that they took as tenants in common, and I will reserve other questions.

(a) 3 *Russ.* 217.

(b) 2 *Hare*, 14.

(c) 9 *Sim.* 549.

(d) 2 *Beav.* 308.

(e) 15 *Beav.* 421.

(f) *Ib.* 357.

The

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March 29.

I have been desirous to give my judgment in this case immediately after the case of *Coulthurst v. Carter (a)*, because each, in different ways, illustrates the rules which govern cases of this description, when one legatee is substituted for another in case of death, either in the case of prior legatees, whether he be a specified individual or one of a particular class to be ascertained.

The questions in this case arise upon the construction of the residuary clause in the testator's will, made on the 26th of February, 1819.

The gift was to the following effect. [*His Honor read it.*]

The testator died on the 8th of June, 1837, and his widow, the tenant for life, died on the 24th of January, 1849. All the five persons named as legatees of the first half of the residue were alive at the date of the will; three of them died in the lifetime of the testator leaving children, six of whom are still living, and defendants to this cause; the remaining two legatees survived the testator, but died before the tenant for life. They both left children, seven of whom are now living, and defendants to this suit.

Of the legatees of the other moiety, one of them, *Ann Smith*, had died before the date of the will, leaving four children, who are all alive and parties to this cause. Two others died in the lifetime of the testator, one without issue and the other leaving children, of whom

two

(a) 15 *Beav.* 421.

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two are now alive and Defendants to this suit. The fifth legatee, *Henry King*, is the only one of the legatees named in his will who has survived the tenant for life.

In this state of things it is obvious that there are four classes of persons claiming as legatees, and a fifth class claiming the personal estate as undisposed of as next of kin of the testator.

1. The first class is that of the legatees who survived the tenant for life, and this is confined to *Henry King*.

2. The second class consists of the children of the legatees who survived the testator, but died during the lifetime of the tenant for life. In this class are six children of *Mary Merrick* and four children of *Thomas King*.

3. The third class consists of the children of the legatees who died before the testator. This class includes three children of *Elizabeth Deverell*, two of *William Deverell*, two of *Elizabeth Edwards* and two of *John King*.

4. And the fourth class, which consists of the children of a legatee named in the will, but who, in fact, was then dead. This class is confined to the four children of *Ann Smith*.

It was contended, in the first place, on behalf of *Henry King*, that these gifts were in joint tenancy, but this I disposed of at the hearing, and expressed my opinion, that the legatees took as tenants in common. There is no question but that *Henry King* is entitled to one-fifth of one-half of the residue, but he is not, in my opinion,

opinion, on the ground of joint tenancy or survivorship, entitled to a larger share.

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With respect to the second and third classes, I am of opinion, that the children of the legatees who would have taken, if they had survived the tenant for life, are entitled to take their parents' share. It is to be observed, in this case, that the gift is not to a class of persons to be ascertained at any particular period; in which case, as the class would not be ascertained till a later period, either the death of the testator or the death of the tenant for life, the children of one of that class could have taken by substitution, only in the event of its having been possible that the parent could have taken. But this is a case where two moieties of the residue, each of which is given in five shares to five named and specified legatees, with a direction, that if any one should have died, the wife or husband of the deceased legatee should take the legatee's share, and that if there should be no wife or husband, then that the respective children of the legatees should take the legatees' share.

The distinction which is to be found in cases of this description is to this effect:—If a testator give a legacy to a class of persons, such as the children of A., and goes on to provide, that in case of the death of any one of the children of A. before the period of distribution, the issue of such child shall take their parent's share, such issue cannot take, unless the parent might have taken; and consequently, if a child of A. be dead at the date of the will or at the death of the testator, the issue of that child cannot take anything. This is the principle I have already stated, in *Coulthurst v. Carter* (a), to be established by *Peel v. Catlow* (b), *Waugh v. Waugh* (c), *Christopherson v. Naylor* (d), and many other cases.

But

(a) 15 Beavan, 421.
(b) 2 M. & K. 41.

(c) 9 Sim. 372.
(d) 1 Mer. 320.

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But if the original legacy be not to a class, but to a named individual legatee, with a direction that in case of death of the legatee before payment, the legacy is to go to another person, although the death of the legatee occurs before the death of the testator, the gift over takes effect, upon the presumption that such ulterior legatee was substituted, in order to prevent a lapse of the legacy. This is decided in *Miller v. Warren* (a), *Darrel v. Molesworth* (b), in *Haughton v. Harrison* (c), in *Mackinnon v. Peach* (d), and in several other cases.

It is this latter principle which, in my opinion, applies to the cases of this will, and the terms of this residuary bequest bring it within the case of *Le Jeune v. Le Jeune* (e), to which I was referred. I could not, in my opinion, exclude these children and the second and third classes from the share given to the prior legatee, without reversing that class of cases to which I have referred, and of which *Le Jeune v. Le Jeune* is an instance.

I am of opinion, therefore, that in every case where the testator specified some individual legatee, who was alive at the date of the will, but who had died before the tenant for life, and who left children who survived the tenant for life, that in all these cases, the children of that legatee are entitled to take the share which the legatee would have taken if then living. It is proper to notice a difference which occurs in the wording of the gift over of the two moieties of the residue, one is, "in case of the death of any or either of them before my said wife Elizabeth," and the other is, "in case of the death of any or either of them," without specifying any period within which the death was to take place, and which

(a) 2 Vern. 207.

(b) Ib. 378.

(c) 2 Atk. 329.

(d) 2 Keen, 555.

(e) Ib. 701.

which period therefore might have reference to the death of the testator, or to the death of the tenant for life. I am of opinion, however, that these words, in both cases, must be held to apply to the same event, viz. the contingency of death before the death of the tenant for life, and that no just argument can be deduced from the absence of these words, "before my said wife Elizabeth," in the disposition of the second moiety of the residue, but that the same principle and rule of construction applies to both.

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The next question is, how far the observations I have already made and the principles I have referred to apply to the case of the children of *Ann Smith*, who were dead at the date of the will. The cases of *Tytherleigh v. Harbin*(a), *Giles v. Giles*(b), and *Jarvis v. Pond*(c), do not, as it appears to me, apply to this case. In those cases, the gift was to the children as original, not as substituted legatees, and it was on that principle that, according to what I considered to be the right construction of the words of the will in the case of *Coulthurst v. Carter*(d), which I have before decided, I held that issue of a child dead at the time of the will were entitled to take the parent's share. But in this case, there is no gift to the children as original legatees; here nothing is given to them except by way of substitution, and only in the case of the failure of the gift to *Ann Smith*. I have not discovered any authority deciding this point. I am however unable to draw any distinction between the case of a gift to a person known by the testator to be alive and in the event of his death to his children, and a gift to a person whom the testator may suppose or believe to be living, but who is in fact dead, with a gift

(a) 6 *Sim.* 329.(b) 8 *Sim.* 360.(c) 9 *Sim.* 549.(d) 15 *Beav.* 421.

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gift over to his children in case of his death. I am of opinion that the principles and reasons applicable to the cases of the designated legatees dying in the lifetime of the testator, and which, in that event, gives effect to the gift, apply equally to the case of the legatee being, although it may be unknown to the testator, dead at the time of making his will.

In this case, the testator gives one-fifth of one-half of the residue to *Ann Smith*, and directs, that in case of her death, her share is to go to her children. I am of opinion, that the cases which show that her children would be entitled under this bequest, if *Ann Smith* had died the day after the will was made, apply equally to the case of her having died the day before, and consequently, in the events which have happened, I am of opinion, that the children of *Ann Smith* who have survived the tenant for life, are entitled to the share which *Ann Smith* would herself have taken, if she had survived the tenant for life.

There are two other questions to be disposed of, one of them is, whether the legal personal representative of *William Deverell* the younger, the son of *William Deverell*, one of the legatees of the first moiety of the residue, is entitled to share with *Mary* and *John*, the other children of *William Deverell* the father; and also whether the legal personal representative of *John Edwards*, the son of *Elizabeth Edwards*, another legatee of the first moiety, is entitled to share with *Thomas Edwards*, the surviving son of *Elizabeth Edwards*, and I am of opinion that they are so entitled. I have decided that the children of a deceased legatee take the parent's share, in the case of the death of that legatee before the death of the tenant for life, at whatever time that death of the legatee may have taken place; but I am
of

of opinion, that in case the legatee died before the testator, the class of the children of the legatee to take the parent's share is to be ascertained at the death of the testator, and that they then take vested interests in reversion, expectant on the decease of the tenant for life, in their parent's share; but that when the legatee has survived the testator and died in the lifetime of the tenant for life, then that the class of the children of the legatee so dying is to be ascertained on the death of the legatee, and that they then take vested interests in reversion in their parent's share, expectant on the decease of the tenant for life.

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In other words, the children of a deceased legatee take vested interests in the parent's share, whenever the class of those children is to be ascertained; and that the class of the children of each legatee dying before the tenant for life, is to be ascertained at the death of the survivor of the testator and the specified legatee.

This only applies to the case of the two persons I have mentioned; and I am of opinion that in the case of *William Deverell*, his legal personal representative takes one-third of the share, which his father would have taken had he survived the tenant for life; and that in the case of *John Edwards*, his legal personal representative takes half of the share which his mother would have taken had she survived the tenant for life.

The remaining question arises on those words of the will which direct that the shares are to go, in the case of the death of any or either of them without children, to the survivors of them. The words clearly apply to the five designated legatees, and *Charles King*, one of those who died, left no children, and the question whether his share is to go to *Henry King*, who was the

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the sole legatee who survived the tenant for life,—or whether it goes in part to the representative of *Thomas King*, who survived *Charles King*, and also the testator. And I am of opinion, that upon the death of the survivor of *Charles King* and the testator, the legatees of this half of the residue then living took vested interests in the share of *Charles*; and consequently, in the events which have happened, that *Charles's* share is divisible between *Henry King* and the representatives of *Thomas King*.

April 2.

The case was mentioned again, when

The MASTER of the ROLLS said,—

I am of opinion that, in the case of those legatees who died before the testator, the class of the children to take their parents' share was to be ascertained at the death of the testator, and that they then took vested interests in their parents' shares, expectant on the decease of the tenant for life; but where a legatee survived the testator, and died in the life of the tenant for life, the class of his children was to be ascertained on the death of the legatee, and that they then took vested interests in their parent's share, expectant on the death of the tenant for life. In other words, they took vested interests whenever the class of legatees was to be ascertained, that is, either on the death of the testator, or of their respective parents, whichever last happened.

I think also that *William Deverell's* legal personal representative takes one-third of the share intended for his father, if living; and that *John Edwards's* legal personal representatives take one-half of the share which his mother would have taken if she had survived the tenant for life.

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PARKIN v. THOROLD.

April 30.

May 1, 22.

ON the 25th of *July*, 1850, the Plaintiff agreed to sell to the Defendant a freehold estate. The abstract was to be delivered within ten days, and by the fifth condition of sale it was stipulated as follows: the purchaser shall pay a deposit, "and sign an agreement for completing the purchase and for payment of the residue of the purchase money on or before the 25th of *October* next," at the office of Mr. *F.*, "*at which time and place the purchase is to be completed.*"

In equity, the time appointed for the completion of a contract is not, as at law, of the essence of the contract; but it may be made so by direct stipulation or necessary implication.

The seventh condition provided, "that in case the completion of the purchase, through the default of the purchaser, shall not take place on the 25th of *October* next, the purchaser shall pay interest, at five per cent., up to the time of actually completing the purchase."

Though time be not originally an essential part of a contract, yet either party may, by notice, insist on its being completed within a reasonable time.

The fifteenth condition provided, that if the purchaser "should neglect or fail to comply with the conditions and to complete his purchase by the time and in manner aforesaid," his deposit should be forfeited to the vendor, who should be at liberty to resell, &c.

Observations as to the necessity of preserving an uniformity of decision in the different courts.

The conditions were signed by both parties, and the deposit paid.

The

DATES.

1850, <i>July</i> 25.	Sale.	1850, <i>Nov.</i> 5.	Extended time expires.
1850, <i>Oct.</i> 17.	Letter.	1851, <i>Jan.</i> 6.	Offer to produce deed.
1850, <i>Oct.</i> 21.	Notice to rescind on 5th November.	1851, <i>Feb.</i> 28.	Action.
1850, <i>Oct.</i> 25.	Time fixed to complete.	1851, <i>Mar.</i> 1.	Suit.

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The abstract was delivered, but difficulties arose, in consequence of a settlement dated in 1804 having been mislaid. A correspondence took place respecting it, and on the 17th of *October* the vendor's solicitors stated: "I only require time to be able to find the settlement. I believe I have found out where it is."

On the 21st of *October*, the purchaser's solicitor gave notice, that unless the settlement were produced and the other requisitions satisfied on or before the 5th of *November*, he would treat the contract as at an end, and require a return of the deposit.

On the 7th of *November*, the deposit was formally demanded. The vendor, on the 8th of *January*, 1851, offered to produce the deed, but the purchaser then stated, that he had long abandoned the contract, and on the 28th of *February*, 1851, he brought an action for the recovery of the deposit. On the following day (1st of *March*), the vendor instituted this suit for the specific performance of the contract.

On a motion to dissolve the common injunction to stay the proceedings at law, Lord *Cranworth*, holding that time was at law and in equity of the essence of the contract, and that it had not been waived, dissolved the injunction (*a*). The action went on, but was afterwards discontinued, and the cause now came on for hearing.

Mr. *Stuart* and Mr. *Terrell*, for the Plaintiff. — Though, at law, time may be of the essence of the contract, yet in equity, where there is no unreasonable delay, the circumstance that the purchase is not completed within the time anticipated by both parties, will not avoid the contract: 1 *Sugden, Vendors and Purchasers*

(*a*) See 2 *Sim. (N. S.)* 1.

chavers (10th ed.), 407; *Seton v. Slade*(a); and see *Dart's Compendium, &c.*, 232 (2nd ed.) The time at which a contract is to be performed is not essential in equity as at law: *Radcliffe v. Warrington* (b).

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"Where a vendor has proceeded to make out his title, and has not been guilty of gross negligence, equity will assist him; although the title was not deduced at the time appointed:" *Sugden's Concise View, &c.* 188, pl. 2. The case now comes on under circumstances differing from those under which Lord *Cranworth* decided it, and is not therefore governed by his decision. Secondly, the Defendant himself has waived the obligation to complete on the day stated, by extending the time.

Mr. *R. Palmer* and Mr. *Speed*, for the Defendant. If time be of the essence of the contract at law, there is no reason why a different rule of interpretation of the same contract should exist in this Court. Lord *Cranworth* has decided, in the present case, that the contract was at an end, and there is no evidence now before the Court which changes the rights then existing between the parties.

But even if time be not essential, still this Court will not interfere where there have been *laches* and delay on the part of the Plaintiff: *Lloyd v. Collett* (c); *Guest v. Homfray* (d); *Alley v. Deschamps* (e); *Harrington v. Wheeler* (f); *Walker v. Jeffreys* (g). "The tendency of the Court, in modern cases, has been, to restrict the exercise of its jurisdiction in enforcing specific performance

(a) 7 *Ves.* 272.
 (b) 12 *Ves.* 326.
 (c) 4 *Bro. C. C.* 469.
 (d) 5 *Ves.* 818.

(e) 13 *Ves.* 225.
 (f) 4 *Ves.* 686.
 (g) 1 *Hare*, 341.

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ance of contracts to those cases, in which the Plaintiff has been prompt in seeking his equitable remedy:" *Southcomb v. The Bishop of Exeter* (a). At any rate, the purchaser had a right, by notice, to limit a time for the completion, and in default of the vendors making out their title within the specified period, to abandon the contract: *Heaphy v. Hill* (b); *Watson v. Reid* (c); *King v. Wilson* (d); and see *Taylor v. Brown* (e).

The extension of the time to the 5th of *November* was for the accommodation of the vendors, and its effect must be limited to that period.

Mr. *Stuart*, in reply, referred to *Omerod v. Hardman* (f), and argued, that there had been no "gross negligence" or "laches" here, but an inevitable accident, arising from the loss of a deed, which the vendors had used every diligence to discover.

The MASTER of the ROLLS. I will take time to consider this case.

May 22. *The MASTER of the ROLLS.*

The Plaintiffs in this case pray the specific performance of a contract for sale of a freehold estate called *Preston*, near *Southmolton* in *Devonshire*, sold by them by auction on the 25th *July*, 1850.

The Defendant, the purchaser, resists the performance of the contract, and contends, that in the circumstances of this case, he ought not to be compelled to perform it.

The

(a) 6 *Hare*, 213, and see *Dart's Compendium*, &c. (2nd ed.) 580.
 (b) 2 *Sm. & St.* 29.
 (c) 1 *Russ. & M.* 236.

(d) 6 *Beav.* 124.
 (e) 2 *Beav.* 180.
 (f) 5 *Ves.* 736.

The Defendant brought an action to recover the deposit on the 28th of *February*, 1851, and on the following day (the 1st of *March*, 1851) the Plaintiff filed his bill for specific performance, and for an injunction. On the answer being filed, the Plaintiff showed cause on the merits against dissolving the injunction, and this motion was heard before Lord *Cranworth* the Vice-Chancellor (a); it appears that his Lordship, after taking time to consider his judgment, dissolved the injunction. The facts, as they appear in evidence before me, were correctly stated in the answer of the Defendant, and substantially the question before me is the same and upon the same materials as the case before Lord *Cranworth*; the only difference being, that I have now to determine the cause on the hearing, instead of making an order to dissolve or continue an injunction. It is, in truth, obvious to me, that the decision of Lord *Cranworth* governs this case; and that I cannot, in this case, make any decree or order, other than one dismissing the bill, without coming to a conclusion opposite to that at which his Lordship arrived. If I could, consistently with my sense of propriety, have avoided coming to any decision on this case, I should undoubtedly have done so. I have repeatedly stated, that in my opinion uniformity of decision was so important to be obtained, that whenever I found a decision pronounced by one of the Vice-Chancellors, I should consider myself to be bound by that decision, where it related either to a new matter or was not opposed by contradictory decisions, or on some one of those principles of equity on which all decisions are founded; and that I should do so, even though, if it had originally come before me uninfluenced by any such decision, I might

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(a) 2 *Sim.* (N. S.) 1.

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might have come to a different conclusion. It is therefore with great reluctance, and with considerable pain, that I am about to take upon myself the responsibility of pronouncing a decree in favour of the Plaintiffs for a specific performance of the contract in question. It is no doubt extremely probable that I may have come to an erroneous conclusion, but I am bound to decide every case according to the best of my judgment, on what I believe to be the settled principles of equity; and I have the satisfaction of reflecting, that as my decision will undoubtedly undergo the ordeal of a higher tribunal, the errors I may commit will not pass unredressed. But I have not thought myself at liberty to decline giving to the Plaintiffs the decree, which, after the most careful consideration of the principles of equity and the settled decisions, I think they are entitled to, although it is not in accordance with the conclusion expressed by a most learned and able Judge, but which I am not able consistently, as I think, with these principles or with those decisions by which I am bound, to follow.

The facts of the case are so fully set forth in the report in Mr. *Simons'* Reports, that it is not necessary for me to refer to them, further than to state the conditions of sale containing two provisoes, which, though referred to, do not appear in the case before Lord *Cranworth*. The 5th and 7th conditions of sale are to this effect:—[*His Honor read them.*] The question upon the facts so appearing is, whether the Defendant, by writing the letter of the 21st of *October*, which was in these terms [*His Honor read it*], and the deed in question not having been produced on the 5th of *November*, was at liberty to abandon the contract.

The case appears to me to be resolvable into the following questions:—The first is, whether time was of the
 essence

essence of this contract; if it was, the contract was not performed within the time. If it be determined that time was an essential part of the contract, then a second question will arise, whether this part of the contract was waived by the Defendant. If it be determined that time was not originally of the essence of the contract, the next question will be, whether the notice of the 21st of *October*, specifying the 5th of *November* as the time for the completion of the contract, made that time an essential part of the contract, or if not, whether the conduct of the Plaintiffs, by acquiescence in that notice, or by laches in not actively enforcing their rights, have deprived them of any right to relief in this Court.

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Upon the first question, there is no great difficulty in stating the rule, although there may be considerable in applying it to the facts of individual cases. At law, time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it. This is not the doctrine of a Court of Equity; and although the dictum of Lord *Thurlow*, that time could not be made of the essence of the contract in equity, has long been exploded, yet time is held to be of the essence of the contract in equity, only in cases of direct stipulation, or of necessary implication. The cases of direct stipulation are, where the parties to the contract introduce a clause expressly stating, that time is to be of the essence of the contract. The implication that time was of the essence of the contract is derived from the circumstances of the case, such as where the property sold is required for some immediate purpose, such as trade or manufacture; or where the property is of a determinable character, as an estate for life. It is needless to refer to the authorities, which are numerous, to support these propositions.

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Unless I am wholly mistaken, they establish, that unless in the cases of direct stipulation, or of necessary implication, time is not considered in Courts of Equity to form such a portion of the contract, as either party can treat to be an essential part of it.

Against this, it was argued, that the later decisions of the Court had, in a great measure, destroyed this distinction between law and equity; that the distinction itself rests on no very intelligible grounds, and is opposed to the provisions of the Statute of Frauds; that a contract must be construed alike at law and in equity, and that a contract to purchase, conditionally upon a title being made by a given day, cannot be converted into a contract to purchase, provided the title be made out at some day other than that specified in the contract; and that consequently, a Court of Equity, unless it considers time to be of the essence of the contract in all cases, will be enforcing a contract other than that which has been actually entered into.

I do not concur in this view of the subject. A contract is undoubtedly construed alike both in equity and at law; nay more, a Court of Law is the proper tribunal for determining the construction of it; and if a serious doubt should arise as to the effect of the words contained in a contract, a case would be directed to a Court of Law for its opinion (*a*) as to the true construction to be put upon the words, which construction would be adopted in equity. But Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find, that by insisting on the form, the substance will be defeated,

(*a*) Cases to law have since been abolished, see 15 & 16 *Vict.* c. 86, s. 61.

defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance. For instance, *A.* has contracted to sell an estate to *B.*, and to complete the title by the 25th *October*; but no stipulation is introduced, that either party considers time of the essence of the contract. *A.* completes the title by the 26th; at law the contract is at an end, and *B.* may bring an action for the non-performance of the contract, and obtain damages for the breach; but equity holds, that unless *B.* can show that the delay of twenty-four hours really produced some injury to him, he is not to be permitted to bring this action, or to avoid the performance of the contract; not certainly on the ground that the 25th of *October* was not a part of the contract, but on the ground that it is unjust that *B.* should escape the performance of a contract, which has been substantially performed by *A.*, by reason of some omission in a formal but immaterial portion of it.

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The jurisdiction of equity in the execution of the specific performance of contracts accordingly is eminently discretionary; it will not enforce a contract where doing so would be productive of peculiar hardship on one party to it. This was acted upon lately by the Lords Justices in the case of *Webb v. The Direct London and Portsmouth Railway Company* (a). Neither will equity enforce a contract, where, though the Court considers the title good, yet considers it sufficiently doubtful that it might reasonably give rise to litigation hereafter between the purchasers and persons not bound by the decree of the Court in the suit for specific performance. It is, I apprehend, on a similar principle, that the Court has regarded the question of time in these matters,

when

(a) 1 *De G. M. & G.* 521, and 9 *Hare*, 129.

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when it has not been specifically and precisely contracted for, as an essential clause in the contract. It then considers how far either party is injured by the delay, and will not permit one to insist upon that, which, although a formal part of the contract, would, in reality, defeat the object which both had in view, at the time when it was made. It is, I apprehend, on a similar principle also, that the whole doctrine relating to equities of redemption, as administered by this Court, is founded. The contract between the mortgagor and mortgagee is precise; if the money and interest is not repaid on the day twelve-month on which the mortgage is made, the estate is to be the property of the mortgagee: the contract is positive and unambiguous, but a Court of Equity will not permit that contract to be enforced, and will restrain the parties from enforcing it at law. It treats the substance of the contract to be a security for the repayment of money advanced, and that portion of the contract which gives the estate to the mortgagee as mere form; and accordingly, in direct violation of the contract, it compels the mortgagee, so soon as he has been repaid his principal money and interest and the costs he has been put to, to restore the estate: and this, although the parties have acted on the contract, and the mortgagee has taken possession on the day when default arose, and has continued in possession for many years; in truth, as a general rule it may be said, any number of years not exceeding twenty, acknowledging no title in the mortgagor.

I am of opinion, therefore, that the later decisions of the Court have not altered the doctrine I have stated as to the cases where time is of the essence of the contract.

I turn therefore to this contract, for the purpose of  
examining

examining it by the principles I have already laid down. In the first place, the time specified is not, by express words, made an essential part of it. This was, in truth, admitted at the bar and could not be denied; nay, more, the seventh condition of sale appears to me to be inconsistent with such a proposition, even if any such could have been maintained on the rest of the contract; and except that it is confined to the default of the purchaser, it is the condition which, in the precedents at the end of the larger edition of *Vendors and Purchasers*, is suggested as proper to be introduced, when it is intended by both parties that time shall not be of the essence of the contract.

Do then any such circumstances exist in this case, analogous to those to which I have already referred, as raising the presumption that time was an essential part of the contract? I find none. The property is not of a perishable nature, the interest in it sold is not of a determinable character, and possession is not required for any purpose of trade or manufacture. I have therefore, on the first question, come to the conclusion, that time was not originally of the essence of this contract.

Having come to this conclusion on the first question, it may be superfluous to express my opinion on the next subordinate point, which would have arisen had I come to an opposite conclusion; but as it may have some bearing on the subsequent part of this case, I think it desirable to do so. I am of opinion then, that if time had been originally of the essence of this contract, the Defendant has waived that part of it. The time mentioned in the contract for the completion of the purchase is the 25th of *October*, 1850, but the Defendant, by his solicitor, on the 21st of *October*, 1850, extends that time till the 5th of *November*, 1850. If time was  
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of the essence of the contract, the contract was at an end, if the title had not been made out on or before the 25th of *October*, 1850, but after that letter, the Defendant would, beyond all question, have been compellable in equity to complete the purchase, if the title had been completed by the 1st *November*, 1850, or any other day before the 5th *November*, 1850. It appears to me, therefore, that, after writing this letter, the Defendant abandoned his right to insist on the completion of the title on the 25th of *October*, 1850, which was the day specified in the contract.

Assume that he did so at the request and for the convenience of the Plaintiffs, still the motive for his so acting will not prevent the fact, that this letter was an abandonment of their right to insist on the completion of the contract on the 25th *October*, 1850, and that he could not have refused to complete it if the title had been made out within the time specified in that letter. But, in truth, the only thing resembling a request from the Plaintiffs was in a letter from their solicitor of the 17th *October* in these words :—" I only require time to be able to find the settlement. I believe I have found out where it is." And the notice does not certainly state that this further time is given either at the Plaintiff's request or for his convenience.

It may undoubtedly be urged, that the Defendant waived the time only conditionally upon another day being inserted and upon that day being made an essential part of the contract ; but this is not, in my opinion, the effect of the letter, nor was it accepted as such by the Plaintiffs, who did not agree to substitute the 5th of *November* for the 25th of *October*, or to make that day an essential part of the contract between them. It is obvious, that one party to a contract cannot, at his
 will,

will, vary one of the terms of it; the assent of both parties to the variation must be obtained, and this was not done, nor do I well understand, how, after the letter of the 21st of *October*, the Defendant could maintain an action at law for the breach of the contract by not completing the purchase on the 25th of that month. I have therefore come to the further conclusion, that even if time had been an essential part of the contract, the Defendant waived that term in it by the letter of the 21st of *October*, 1850.

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The next question I have to consider is, whether the notice contained in the letter of the 21st of *October*, 1850, specifying the 5th of *November*, 1850, as the time for the completion of the contract, made that time an essential part of the contract; or rather, whether it bound the Plaintiffs to complete within that period of time or to abandon the contract. It is, I consider, the undoubted law of this Court, that although time was not originally an essential part of the contract, still that either party may, by a proper notice, bind the other to complete, within a reasonable time to be specified in such notice; and if the party receiving such notice do not complete within the time so specified, equity will not enforce a specific performance of the contract, but leave the parties to their remedies and their liabilities at law. The doctrine on this subject is I think well laid down in *Walker v. Jeffreys*(a) and *Southcomb v. Bishop of Exeter* (b) by Sir James Wigram.

To determine whether the letter of 21st *October* was such a notice binding the Plaintiffs to complete by the 5th *November*, 1850, it is necessary to refer to the facts. The state of the case was this:—In order to make out the title, the original of a settlement, a copy of which

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(a) 1 *Hare*, 341.(b) 6 *Hare*, 213.

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was before the Defendant's solicitor, was required to be produced for the purpose of examination with the copy. On the 17th of *October*, 1850, the Plaintiffs' solicitors wrote to say, they only required time to produce it, and that they believed that they have found where it was. Four days after this, the Defendant gives notice, that if the title is not completed by the 5th *November*, he shall treat the contract as abandoned. On the 7th *November*, the Defendant's solicitor applies for the deposit and treats the contract as at an end, and does no act afterwards to acknowledge its existence. The question is, whether, in these circumstances, this period of fourteen days was or was not a reasonable time within which to require the Plaintiffs to produce the deed in question and complete the title, or else to put an end to the contract, and I am of opinion that it was not.

In none of the reported cases can I discover any such time being treated as sufficient for such or a similar purpose. If time was not of the essence of the contract, as for the purpose of considering this question I assume that it was not, it is plain, that this notice must be treated as given pending the discussion on the title, and having no reference to the time mentioned in the contract. The Defendant knew the contents of it; the comparison of the copy with the original when produced was all that was required; the draft conveyance was to be prepared and engrossed, which was to be done by the purchaser; and with the strongest desire and intention, on my part, not to weaken the tendency of the modern decisions, which have, in my opinion rightly, held a stricter rule on the subject of time than the earlier ones, I cannot come to the conclusion that this was a reasonable or sufficient time for the purpose specified in the notice.

But

But although the notice was not sufficient, then the next question arises, the Plaintiffs may have acquiesced in it, or they may, by *laches*, have waived their right to seek for any relief from this Court. *Heaphy v. Hill* and *Watson v. Reid* establishes this proposition, which I apprehend to be the settled law of the Court, viz. that if one of two parties to a contract for the sale of land, give to the other notice that he will not perform the contract, and the person receiving the notice does not, within a reasonable time after the receipt of such notice, take steps to enforce the contract, equity will consider him to have acquiesced in the abandonment of the contract, and will leave the parties to it to their remedies at law; and the tendency of modern decisions has been to diminish the time allowed to either party for enforcing his right under the contract. It remains to apply these principles to the facts of the present case. Even though the time given by the notice of the 21st *October*, 1850, be not, in my opinion, sufficient, the Defendant is entitled to have it treated as an express notice of his abandonment of the contract on the 5th of *November*, 1850; then the question is, whether the Plaintiffs have acquiesced in this notice, or been guilty of such *laches*, as to prevent them from seeking the assistance of a Court of Equity.

On this subject the dates are material. On the 7th of *November*, 1850, the Defendant's solicitor applied for a return of the deposit; on the following day, the Plaintiffs' solicitor sent an answer, stating, that in a few days he would be able to produce the deed, and stating the name of a gentleman, who, if the Defendant wished to get rid of his contract, would, he believed, take it, and referred to a conditional request for an extension of time made by the Defendant at the time of the sale. During the month of *November* the correspondence

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spondence is continued as to whether the Defendant did or did not ask for or obtain an extension of the time for completing the purchase till Christmas. In the month of *December* several applications for the deposit were made by the Defendant's solicitor, which were met by evasive answers from the Plaintiffs' solicitor, till, on the 6th *January*, 1851, the Plaintiffs' solicitor writes to say, that he is in a condition to produce the deed in question, and gives notice where it may be inspected. The following day the Defendant's solicitors reiterated their statement of the contract being at an end. On the 22nd *January*, 1851, the Plaintiffs' solicitor states, that he has instructions to file a bill for specific performance. Various other letters take place, showing that steps are taken on both sides for the institution of proceedings, both at law and in equity ; and on the 28th *February*, 1851, the action is brought by the Defendant for the deposit, and on the following day this bill was filed.

This statement shows, that there has been no actual acquiescence by the Plaintiffs in the notice of abandonment given by the Defendant. Has there been any implied acquiescence, or any *laches* on their parts, sufficient to prevent them from obtaining the assistance of a Court of Equity? The time to be accounted for is from the 21st *October*, 1850, till the 7th of *January*, 1851, i. e. two and a half months ; but the evidence shows that during that time the Plaintiffs' were, by their solicitors, employed in discovering where the deed in question was, and in freeing it from the lien which prevented its production. On the 7th of *January* notice of its production is given, and from that time as soon as it appeared that Defendant insisted on his previous abandonment of the contract in spite of the production of the deed, proceedings appear to have been going on  
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both sides for the purpose of enforcing their rights at law and in equity.

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I am convinced that no Court, having regard to these decisions on this subject, will hold, that under these circumstances the Plaintiffs can be said to have forfeited what rights they had in equity, by reason of any implied acquiescence in the notice of the 21st of *October*, 1850, or by reason of their having been too negligent and dilatory in the enforcement of their claim.

The short result of the opinion that I have come to is,

First.—That time was not originally of the essence of the contract.

Secondly.—That although express notice will make time of the essence of the contract, where a reasonable time is specified, that the notice of the 21st *October* did not specify a reasonable time for this purpose.

Thirdly.—That although acquiescence in the abandonment of a contract or laches in seeking the assistance of a Court of Equity will bar a party to a contract enforcing his rights, yet that there are not any facts in evidence before me to justify the Court in holding that the Plaintiffs acquiesced in such abandonment, or that he has been guilty of such *laches* as will prevent this Court from enforcing the specific performance of this contract.

There are other parts of this case respecting which evidence is given, which I think it unnecessary to refer to, such as the evidence respecting the conditional request

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quest made by the defendant for an extension of the time for completing the purchase on his part till Christmas. It is obvious that this case will be carried to a higher tribunal; and as I have felt myself compelled to differ from the very learned and careful Judge who decided this case on the motion for dissolving the injunction, I have considered it incumbent upon me to state, as clearly as I could, the grounds on which I proceeded, and to state those grounds only on which my decision rests. It is with great regret, but under an imperative sense of duty, that I have thought myself bound to state the conclusion I have come to.

The decree pronounced by me will be the common decree for specific performance, with a reference to the Master as to title, unless that be accepted; and as the suit has been rendered necessary by the resistance of the Defendant to perform the contract, it follows, as a necessary consequence from my decision, that the Defendant must pay the costs of the suit, so far as the same has been incurred by reason of his resisting his liability specifically to perform the contract.

NOTE.—See *Roberts v. Berry*, *ante*, p. 31, affirmed by the Lords Justices, 20 Jan. 1853.

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March 12, 15.

THE testator bequeathed his personal estate to *Cottee* and two others, upon trust to invest the produce in "the public or Government Stocks or Funds of *Great Britain*, or upon real security in *England* or *Wales*," and to hold, upon certain trusts during the life of his widow, and afterwards upon trusts in favour of his infant children and their families.

And he directed, that after the death of his wife, the trustees should apply the income towards the maintenance and education of his children during their minority, "and," he proceeded, "shall accumulate the surplus annual income of each such child, until he or she shall attain the age of twenty-one years, and invest the same, from time to time, in the names of my trustees, &c.

The testator died in *January*, 1844, and his wife in *November* in the same year.

The executor *Cottee* invested part of the testator's personal estate in *Russian, Belgian, Dutch* and other foreign stocks and bonds, and upon Exchequer bills. One of these transactions was as follows:—In 1845 and 1846 he invested 4,063*l.*, part of the testator's estate, in 3,900*l.*

into Court and sold in the same year at a loss. In 1848, it was declared by the decree, that the investment was improper, but at that time, the price of Exchequer Bills had risen, so that there would have been then no loss if they had been retained. Held, that the executor ought to be charged with the amount improperly invested, and credited with the produce of the Exchequer Bills in 1846.

Costs of an administration suit given to an executor, though charged with the consequences of an improper investment.

Rule as to charging executors and trustees with interest on balances, and at what rate and whether with annual rests.

An executor and trustee who was directed to invest in Government Stocks of *Great Britain*, or upon real security, and accumulate the surplus, after maintaining infants, invested the estate in the foreign funds. It was held, that the investment was improper, and he was charged with four per cent. with annual rests.

In 1846, an executor invested part of the assets in Exchequer Bills; they were ordered

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3,900*l.* Exchequer bills, and in *July*, 1846, he was ordered to deposit them with the Accountant-General, to the credit of the cause, and under a subsequent order in *November*, 1846, they were sold for 3,955*l.*, and at a loss, and the produce invested in the 3*l.* per cents. ; but if they had been sold at the date of the decree (*March*, 1848), and invested, there would have been no loss, but on the contrary.

By the decree made in *March*, 1848, the Court declared, that the investment of the personal estate in Exchequer bills, *Russian* bonds, *Belgian*, *Dutch* and other foreign stocks and bonds was an improper investment; and in taking the accounts, the Master was to have regard to that declaration.

The cause now came before the Court upon exceptions and for further directions.

Mr. *Lloyd* and Mr. *Selwyn*, for the Plaintiffs (two of the testator's children) contended, that the executor having neglected to obey the express directions for accumulation, was chargeable with interest on his balance at 5*l.* per cent., with annual rests: *Raphael v. Boehm* (a); *Stacpoole v. Stacpoole* (b); *Williams v. Powell* (c); and see *Jones v. Foxall* (d); or that he ought to be charged, at the option of the Plaintiffs, with the stock and accumulations which would have been produced if the investments had been made in consols.

Secondly.—That the executor ought to have credit for the money produced by the Exchequer bills, as on the 1st of *December*, 1846, when they were actually sold.

Thirdly.

(a) 11 *Ves.* 92, and 13 *Ves.* 590.
 (b) 4 *Dow.* 209.

(c) 15 *Beav.* 461.
 (d) *Ib.* 388.

Thirdly.—That he ought not to have any costs of suit.

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Mr. *Campbell* and Mr. *Bagshawe*, *contrà*, for *Cottee*, argued, that the direction to accumulate applied only to the surplus income, and that the executor was chargeable with 4*l.* per cent. only on balances in hand, but not with annual rests. That the Plaintiffs had no right to make the Defendant account as for stock investments, *Robinson v. Robinson (a)*.

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Secondly.—That the executor having been charged with the 4,063*l.* invested in Exchequer bills in 1845 and 1846, was entitled to have the benefit of the Exchequer bills which had been withdrawn from his control and sold in 1846, before the invalidity of the transaction had been declared. That therefore the Exchequer bills ought to be treated as sold in *March*, 1848, when it was declared that the investment was improper, by which means the executor would be relieved from all loss.

Thirdly.—That as this was a mere administration suit, the Defendant, the executor, was entitled to his costs, *Tebbs v. Carpenter (b)*.

The MASTER of the ROLLS.

Here is an executor who had a direct and positive trust to perform, which was, to invest the money upon government stocks or funds, or upon real securities, and accumulate at compound interest all the balances, after maintaining the children. He has made certain investments, which the Court has declared to be improper. The case must either be treated as if these investments had not been made, or had been made for his

(a) 1 *De G. M. & G.* 247.

(b) 1 *Mad.* 290.

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his own benefit out of his own monies, and that he had at the same time retained monies of the testator in his hands. I think, therefore, that there must be a reference back, to ascertain what balances the executor retained from time to time, it being clear that he has retained some balances.

The next question is, at what rate of interest ought he to be charged? The usual course is, to charge an executor with four per cent., where he has simply retained balances; but where he has acted improperly, or has employed the trust money in trade for his own benefit, or has been guilty of other acts of misconduct, the Court visits him with interest at five per cent. In this case there does not appear to me to have been any such misconduct as to make him answerable at five per cent. It appears simply a case in which an executor has retained monies, which he has not properly invested. I am therefore of opinion, that he ought to be charged with interest at four per cent. and with annual rests; for there is an express trust for accumulation, of which he was aware when he retained the trust monies.

I cannot concur in the argument that the Court must charge him as if the money had been invested in consols. If that were so, the Court must charge him the other way where the funds have fallen, which it never does. There was a conflict of decision as to how a trustee was to be charged, where the investment might either be made in the funds or on real security. The decisions of Lord *Langdale* and Sir *John Leach* were opposed (a). The case, however, of *Robinson v. Robinson* has settled the

(a) *Marsh v. Hunter*, 6 Madd. 295; *Watts v. Girdlestone*, 6 Beav. 188; *Ames v. Parkinson*, 7 Beav. 379; *Ouseley v. Anstruther*, 10 Beav. 456.

the rule, and I have adopted it in a former case. I stated my reasons for doing so.

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As to the mode of charging the executor in respect of the Exchequer bills, I treat the laying out in Exchequer bills in this way:—The persons interested were entitled to ear-mark them, as being bought with the testator's assets, in the same manner as if the executor had bought a house with the trust funds; and though they do not recognize the investment, they had a right to make it available for what was due; and though part of the property of the executor, it was specifically applicable to the payment. When the Exchequer bills were sold and produced 3,955*l.*, the Court must consider the produce as a sum of money refunded by the executor to the testator's estate on that day; and on taking the account, the Master must give credit for this amount as on the day on which the Exchequer bills were sold.

As to the costs, I think there is not sufficient in this case to induce me to apportion them. I am disposed to give the executor all the costs, except those of his exceptions, which have failed, reserving the costs of the reference back, which has become necessary by reason of the retainer of balances in his hands. I am always disinclined to make refined distinctions in the apportionment of costs, on account of the expense of apportionment.

I must give the executor his costs as between solicitor and client up to the present time, except those of his exceptions, which he will have to pay.

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KNOTT v. COTTEE.

Exceptions
will not lie to
a Master's
Report for not
stating "special
circumstances."

THE decree, after certain directions, proceeded as follows :—"And the said Master is to be at liberty to state any circumstances specially relating to any of the matters aforesaid, as he shall think fit."

The Master made his report, stating certain special circumstances, and the Defendant took exceptions, one of which was in this form :—"For that the Master has found as special circumstances that, &c. [*stating them*]; whereas the Master ought to have found, in addition to such matters, as special matter, that [*stating the additional facts*]."

Mr. *Campbell* and Mr. *Bagshawe*, in support of the exception.

The MASTER of the ROLLS.

It is a general rule that no such exception can be taken. I have heard Sir *James Wigram* state, over and over again, that you cannot except to a Master's report because he has not reported particular facts as special circumstances. The Master is to report "any circumstances specially as he shall think fit," and you cannot object to his report, because he has exercised the discretion intrusted as he thought best. This exception must be overruled.

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TRILLY v. KEEFE.

March 25.

April 20.

BY the decree, made on the 15th of *July*, 1851, it was ordered, that the bill should be taken *pro confesso* against *Walter Shea*, who was resident in Ireland.

Service on the Defendant of an order limiting the time within which he might apply to set aside a decree *pro confesso*, held a sufficient notice, under the 87th Order of May, 1845; and no application being made by him, the decree was thereupon made absolute.

By an order made on the 8th of August, 1851, it was ordered, that the time for *Walter Shea* to apply for permission to put in his answer and set aside the decree, after service of notice for that purpose, and of an office copy of the decree, pursuant to the general order, should be limited to the 1st day of Michaelmas Term, 1851 (2 *November*, 1851); but service of such notice and office copy of such decree should be made before the 10th of *September*, 1851.

Walter Shea was duly served with an office copy of the decree and order, but he did not apply to put in an answer or set aside the decree.

Mr. Batten now moved to make the decree absolute, under the 90th Order of the 5th of *May*, 1845 (a). It was suggested, that the service of the order of the 8th of *May*, 1851, was not a sufficient notice within the 87th Order of *May*, 1845 (b).

The MASTER of the ROLLS held it sufficient, and made the decree absolute.

(a) *Ordines Can.* 317.

(b) *Ib.* 316.

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April 16, 19,
20.

SHORTRIDGE v. BOSANQUET.

A transfer of shares in a banking company, though invalid at law for want of a proper consent of a "Board of Directors" to the transfer, yet supported in equity, the transfer having been made in "The Share Register Book," three directors having given the customary certificate of the transfer, and a return

IN 1836, a joint stock bank, called "The *Newcastle, Shields and Sunderland Union Banking Company*," was established.

The Plaintiff *Shortridge* held shares from its commencement, and in *July*, 1847, he sold 200 shares to Mr. *Thew* and 40 to Mr. *Miller*; and the question in this cause related to the validity of their transfer. The 144th section of the Deed of Settlement provided, that no person should become a shareholder without the consent of a "Board" of Directors, which, in this instance, had not been strictly obtained.

Upon the sales of the shares in question, notices, in the

having been made to the Stamp Office that the Plaintiff had ceased to be a member.

In *October* a banking company stopped payment. The Plaintiff had in *July* sold his shares, the purchaser had obtained certificates from three directors of ownership, the transfer had been entered in "The Share Register Book," and the company had returned to the Stamp Office that the Plaintiff had ceased to be a member; but no formal consent of a "Board of Directors" to the transfer had been obtained, as required by the company's deed. The company instigated a creditor to sue the Plaintiff, and, to enable him to succeed, they retransferred the shares into the Plaintiff's name in their books, and made a new return to the Stamp Office, including him as a shareholder. The creditor recovered at law. Held, nevertheless, that in equity the Plaintiff was no longer a shareholder as between him and the company; and, secondly, that the proceedings of the creditor being collusive, he ought not in equity to be allowed to enforce his judgment.

DATES.

1847, <i>July</i> .	Sales of shares.	1848, <i>Jan.</i> 8.	Transfer disputed by Company.
1847, <i>Aug.</i> 26.	Certificate, receipt and transfer in books.	1848, <i>Jan.</i> 14.	Retransfer made.
1847, <i>Sept.</i> 22.	Dealings with <i>L.</i> and <i>W.</i> Bank commenced.	1848, <i>Jan.</i> 15.	Return to Stamp Office.
1847, <i>Oct.</i> 8.	Return to Stamp Office.	1848, <i>Jan.</i> 24.	Action commenced.
1847, <i>Oct.</i> 21.	Company stopped payment.	1849, <i>Dec.</i>	Trial.
1847, <i>Dec.</i> 8.	Company instigate action.	1850, <i>Apr.</i> 19.	Suit.
		1850, <i>July</i> 8.	Rule for New Trial discharged.

the usual printed form, and signed by the Plaintiff, were delivered at the bank, stating that he had agreed to sell, and proposed to transfer those shares to the purchasers. The broker, at the same time, asked if the transfers would be accepted; and the clerk, after referring to the managing director, answered in the affirmative. The purchase-money was in consequence paid, and on the 26th of *August*, the shares were transferred into the names of the purchasers in the "Share Register Book," and a certificate of ownership handed over to the purchasers, signed by three directors, certifying under the 83rd section that *Thew* was a proprietor of 200 shares, and that the shares stood in his name in the "Share Register Book." This certificate was not in conformity with the form of consent to transfer specified in the 144th section (a). *Thew* on the same day signed a receipt of the certificate from the board of directors of shares "lately held by *Richard Shortridge*," and declared, that he held them subject to the covenants in the deed of settlement of the company.

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No formal consent was ever given by a "Board" of Directors, as required by the 144th section; but on the 8th of *October*, 1847, the company made a return upon oath, to the Stamp Office, under the 7 *Geo.* 4, c. 46, s. 8, in the form in schedule B., stating that the Plaintiff had ceased to be a member of the company.

After the transfers, the purchasers were treated as shareholders by the directors; they received the dividends, the circulars of general meetings, and the notices of calls, and they attended meetings, and were threatened with proceedings for their calls.

On the 21st *October*, 1847, the Union Bank, though
 it

(a) See *post*, p. 88.

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it had hitherto paid a dividend of ten per cent., suspended its payments, being at that time indebted to the *London and Westminster Bank*, with whom it had opened an account on the 22nd of *September*, 1847, and the debt then amounted to 50,000*l*.

In *December*, 1847, the *Newcastle Bank*, alleging that some wealthy shareholders had transferred their shares to parties of limited means, within a few weeks of the suspension of its payments, instigated the *London and Westminster Bank* to obtain judgment against the *Newcastle Bank*, and then presented them with a list (in which the Plaintiff was included) of persons to be sued upon the judgment. The *Newcastle Bank*, on the 8th of *January*, 1848, informed the Plaintiff that they would not allow the transfer of the 200 shares to *Theo*, nor the 40 shares to *Miller*, "for want of proper assent, on the part of the board of directors, to the sale and transfer of those shares, as prescribed by the deed of settlement." This was resisted by the Plaintiff, and on the 14th of *January*, 1848, a board of directors caused an entry to be made in the "Share Register Book," that the consent of the board of directors to the transfers from the Plaintiff not having been given, and this entry having been made without their authority, the alleged transfer was null and void."

On the 15th of *January*, 1848, they made a new return to the Stamp Office, wherein they included the name of *Shortridge* as the holder of the 240 shares, and this they did in concert with the *London and Westminster Bank*, and for the express purpose of enabling that bank to sue the Plaintiff. The *London and Westminster Bank* accordingly, on the 24th of *January*, 1848,

(a) Under the 7 *Geo.* 4, c. 46, s. 8.

1848, proceeded by *scire facias* against the Plaintiff and obtained judgment (a).

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It appeared that for four or five years the same course as that described had been pursued, and that the company had not, in practice, required any formal consent of a *Board of Directors* to the transfer of shares, the matter being arranged at the office of the bank by the managing director.

The Plaintiff instituted the present suit on the 19th day of April, 1850, alleging that he was no longer a shareholder of the *Newcastle Bank*; that by collusion between the two banking companies the action had been brought; and that he was not liable. The bill prayed, in effect, a declaration, that the Plaintiff was no longer a shareholder in the company:—that his name might be erased from the books, and for an injunction to restrain the company from continuing it therein or in any return, and to restrain the *London and Westminster Bank* from prosecuting their action, and that the *Union Bank* might indemnify the Plaintiff against any losses sustained by him from the proceedings.

The clauses of the deed of settlement relating to the question were to the effect following:—

83. That the board of directors shall deliver to every person approved by them as fit to be a holder of shares, after the entry of his name, &c. in the Share Register Book, a certificate signed by three of the directors, specifying the number of shares, and that they stood in his name in the Share Register Book.

84. The board of directors were to cause the name, &c. of every person entitled to be registered to be inserted as the holder of any shares in the "Share Register Book."

85. That the board of directors shall alone have the power to make any

(a) See *Bosanquet v. Shortridge*, 4 *Exch. Rep.* 699.

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any entry, erasure or alteration in the "The Share Register Book," and the same shall not be inspected without permission of the board.

138. Every person entitled to any shares was entitled to be registered as the holder thereof, or to dispose of the same.

144. That no person shall become or be registered as a shareholder without the consent of a board of directors, who may, on the application of any shareholder or other person entitled to dispose of any shares, testify the same by a certificate in writing, signed by three of the directors, which may be in the following form:—

Then followed a form, by which the three directors purported to consent to the shares specified being transferred to *A. B.*, and to his name being entered in "The Share Register Book" as holder of such shares.

146. After such certificate shall be duly signed, the person applying might require the name of the proposed shareholder to be entered in the Share Register Book; and after such entry, the former owner was not to have any claim or demand against the company, and was to be free and discharged from all covenants, agreements, &c. respecting such shares.

147. That every such certificate of consent shall be deposited with and remain in the custody of the board of directors.

148. If the directors refused their consent, the company were bound to take the shares at the average price.

156. Every entry, erasure or other alteration which, upon the purchase of any shares, should have been made by the board of directors in "The Share Register Book," was to be binding and conclusive on the last shareholder, who was not to be at liberty to dispute or call the same in question, nor, for that purpose, to inquire whether all the rules and regulations had been duly observed; but if they had not been observed, he might maintain his action against any person for the neglect.

157. Made it unnecessary for the board of directors, previous to the entry of a new holder in the Share Register Book, to inquire whether the shares had been effectually vested in him.

158. The Share Register Book was, as between the company and every person claiming to be a shareholder, to be conclusive evidence on behalf of the company to show whether he was a shareholder.

159. The

159. The certificates of the board were to be conclusive evidence, on behalf of such shareholder, that he was a shareholder in respect of the shares mentioned therein, and should continue to be "until such entry, erasure or other alteration, as hereinbefore is mentioned, shall have been made by the board of directors in The Share Register Book, for the purpose of making it appear therein that the holder of the shares mentioned in such certificate or certificates is no longer entitled to such shares."

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162. None of the shareholders were to be at liberty to examine or inspect the books, &c. of the company.

Mr. *R. Palmer*, Mr. *Elmsley* and Mr. *Bates*, for the Plaintiff. — At law, the Plaintiff *Shortridge* relied on legal defences, and he could not avail himself of his equities as against a creditor of the banking company. The action at law, therefore, merely decided that there had been no legal transfer, leaving untouched the equities between the parties.

It is admitted, that for five or six years the practice of the company was to allow of transfers without going through the form of obtaining the consent of a *board* of directors; the certificate of three directors and the transfer in the company's books was all that was done. The law is this, that whatever may be the terms of the partnership deed, partners may, by their conduct and mode of conducting their affairs, waive or vary the terms of the written agreement between them, *Const v. Harris* (a); and when, in practice, formalities have been disregarded by the company, the Court assumes a waiver of the formalities and an universal assent to the variation: *Walters' case* (b). As a party who claims the benefit of shares, transferred without the prescribed formalities, cannot avail himself of the want of them to escape the liabilities of a contributory, *Maguire's case* (c);

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(a) *Turn. & R.* 523.(b) 3 *De G. & S.* 149.(c) 3 *De G. & S.* 31.

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The Cheltenham &c. Railway Co. v. Daniel (a); The Sheffield, &c. Railway Co. v. Woodcock (b); so, on the other hand, a company is not entitled to treat a transaction as void, by reason of the non-observance of the forms, which their own irregularity and neglect have made it impossible to observe, *Ex parte Bagge (c)*. Here the shareholders had no power or control over the books or the proceedings of the directors; they had no means of ascertaining whether the formalities had been complied with, except through the certificate. If the books were binding, then, immediately on the Plaintiff ceasing to appear on the books and in the return to the Stamp Office, all power over him as a shareholder ceased. Even if they had the legal power to do so, it was a fraudulent abuse of it to reinstate the Plaintiff's name and return him as a shareholder to the Stamp Office *post litem motam*.

The case is very similar to *Taylor v. Hughes (d)*, in which a banking company having stopped payment, certain shareholders contributed towards payment of the debts, but others refused. A creditor, by arrangement with the company, obtained a judgment by confessions against the public officer, and then, at the instance of the company, issued a *scire facias* against the Plaintiff, who had been a shareholder, but, before the contract with the creditor, had, by informal transfers, assigned his shares to a trustee for the company. This was held fraudulent, and the creditor was restrained from proceeding at law against the Plaintiff.

As to the *London and Westminster Bank*, the proceeding is wholly collusive. They had notice of the nature of the whole transaction, and have been put forward by the

(a) 2 Q. B. Rep. 281.
 (b) 7 M. & W. 574.

(c) 13 Beav. 162.
 (d) 2 Jones & Lat. 24.

the *Newcastle Bank* for their own purposes and benefit. The case must therefore be determined upon the equities between the Plaintiff and the *Newcastle Bank*. It is a fraud for a creditor to sue a member, at the instigation and for the benefit of the company, *Lewis v. Billing* (a); *Fernihough v. Leader* (b); and *Cutts v. Riddell* (c).

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Mr. Rolt, Mr. Campbell and Mr. Hetherington, for the *London and Westminster Bank*.—These Defendants are creditors of the *Newcastle Banking Company*, and whatever may be the equities of the shareholders and directors *inter se*, the *London and Westminster Bank* have a clear right to enforce their legal rights and obtain payment from any of the legal shareholders. The action at law has decided, that the Plaintiff is a shareholder and liable to the *London and Westminster Bank*, and any defence, arising from a fraudulent alteration of the books or an irregular return to the Stamp Office, was matter to be relied on upon the trial of the action. There has been no new trial, nor any appeal to the Exchequer Chamber, and therefore the legal rights have been finally determined.

Courts have held companies strictly to the terms of their partnership contract, and any informality is fatal, *Morgan's case* (d); *Ex parte Hall* (e); *Ex parte Lawes* (f); *Ness v. Angas* (g); *Burne v. Pennell* (h).

The directors are mere agents, and could only bind the company to the extent of their authority; they had no power to relieve a shareholder from the obligations expressly imposed by the deed.

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| (a) 4 <i>Railw. Cas.</i> 414. | <i>Mac. & Gor.</i> 307. |
| (b) <i>Ib.</i> 373. | (f) 1 <i>De G., Mac. & Gor.</i> |
| (c) 1 <i>De G. & S.</i> 226. | 421. |
| (d) 1 <i>Hall & T.</i> 320, and 1 | (g) 3 <i>Exch. Rep.</i> 805. |
| <i>Mac. & Gor.</i> 225. | (h) 2 <i>H. Lds. Cas.</i> 497. |
| (e) 1 <i>Hall & T.</i> 580, and 1 | |

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By the 158th clause of the deed, the share register book is conclusive evidence on behalf of the company; and by the 156th clause, the directors had express power to make erasures and alterations; and a power to correct errors was incident to their office of directors. This is not a case of collusion, but the creditor is exercising his legal powers for his own benefit.

Mr. Roupell, Mr. Lloyd and Mr. Stevens, for the Newcastle Bank.

Mr. R. Palmer, in reply.

April 20.

The MASTER of the ROLLS.

I entertain no doubt that the Plaintiff is entitled to a decree.

There are two questions in this case; first, whether the Plaintiff, as between himself and the *Newcastle Bank*, is a shareholder, and if he be not, then, secondly, whether the action at law is the *bonâ fide* action of the *London and Westminster Bank*, so that they ought to be permitted to enforce the judgment, or whether it is not in reality the action of the *Newcastle Bank*. I lay aside, for the present, the consideration whether these sales were fraudulently made by the Plaintiff with a knowledge that the Bank was in a failing condition, and I shall, for the present, assume that the sales were *bonâ fide*.

The legal right of the *London and Westminster Bank* has been clearly settled by the action at law, and therefore if the Plaintiff is entitled to any relief, it must be by reason of some equity. In considering this, I shall first examine how the matter would now stand if no alteration

alteration had taken place in the books of the *Union Bank* as they existed prior to the 8th of *January* ; and I shall next consider, how the subsequent alterations have varied the equities between the parties.

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If the books had remained unaltered, the Plaintiff's name would not appear upon them as a shareholder. The onus of proof would then be shifted and be the reverse of what it was in the action of *Bosanquet v. Shortridge*, in which the books and the stamp office return included Mr. *Shortridge* as a shareholder, which made it incumbent on him to show that a valid and legal transfer of the shares had been made by him to other persons. The Court of Law, however, held, that the transfers, which were found by the special verdict to have been made without the consent of a board of directors, as required by the deed, were not valid and legal, so as to discharge the Plaintiff from his liability as a shareholder. On the assumption on which I am now proceeding, that the Plaintiff's name does not appear in the books or the return, the burthen of proof rests with the *Newcastle Bank*, to show that the Plaintiff is still a shareholder. And on this part of the case I have to consider how far the evidence establishes that fact, and whether the *Union Bank* are at liberty, consistently with their contract, to insist that he is. For this purpose it becomes very material to examine the provisions of the deed of settlement of the company. The board of directors are to deliver to the persons approved by the board as fit to be shareholders a certificate of the shares held (*a*). These have been delivered to Mr. *Thew* and Mr. *Miller*. The board are to enter the names in the Share Register Book (*b*), and they also have the power of making any entry or alteration in it (*c*), and no person is to be registered

as

(a) 83rd Clause.

(b) 84th Clause.

(c) 85th Clause.

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as a shareholder without the consent of the board. The directors therefore are to keep the book, and the shareholders have no mode of ascertaining how it is kept (a), or whether their names have been duly entered therein; all that they can do is, to require a certificate, signed by three directors, of their holding their shares. The Share Register Book on behalf of the company (b), and the certificate on behalf of a shareholder, is to be conclusive evidence to show whether he is a shareholder in the company. There was good reason for adopting this regulation. A purchaser had not the means of ascertaining, by actual inspection, whether his name had been duly entered in the Share Register Book, which nevertheless is to be conclusive against him, and therefore he is entitled to a certificate, which is to be conclusive in his favour. Then on the assumption that Mr. *Thew's* name appears on the Share Register Book as the owner of the 200 shares, the 158th clause is distinct, that it is to be conclusive evidence as between him and the company, and it is therefore conclusive evidence that Mr. *Thew*, and not the Plaintiff, is now the holder of the 200 shares which the company now allege have not been duly transferred by the Plaintiff. The shareholders having no means of ascertaining whether the board of directors had strictly complied with all the provisions of the deed, in their mode of keeping the Share Register Book, how can the Board of directors be now permitted to say, the entries in that book are entirely fictitious, and that although they have kept it in a most irregular and improper manner, and although they may be very much to blame, and the Plaintiff may have a right of action, yet the company who have confided to them the due conduct of its affairs is not liable, nor are they bound by an entry which they or some unauthorized person has made in the Share Register Book. The answer made by the Plaintiff is this:—If the

(a) 162nd Clause.

(b) 158th Clause.

the contract entered into by me had been that I was to be liable for any irregularity in the mode of keeping the books, it ought to have been so expressed; but the contract which I entered into was, that this book should be conclusive evidence between us. I ascertained the name of my transferee had been entered in the book, and the transfer clerk delivered over a certificate that the entry had been duly made accordingly, and this is conclusive as between us. The Plaintiff may also well say, "if this had not been conclusive, and the directors had not consented to the transfer, I would, under the compulsory clause, have compelled the company to take the shares at the average price."

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It appears to me, therefore, that neither the directors nor the board of directors nor the company itself can be allowed to give evidence that those entries and certificates are invalid; or to insist that the 158th and 159th clauses making them conclusive evidence are to be wholly disregarded. It was suggested, that the Plaintiff might have applied for a certificate under the 144th clause, but after Mr. *Thew* had received the certificate of transfer, the Plaintiff could not have obtained it, for the clause only entitles a person to obtain it who is still a shareholder and desirous to transfer. But if he had applied and had obtained such a certificate, it would not have advanced him one step; for the same objection now urged would have been made to it, viz., that it was given by three directors, and not by the board.

I am therefore of opinion, that if the books remained unaltered and the return to the stamp office unchanged, and if the names of Mr. *Thew* and Mr. *Miller*, and not that of the Plaintiff, appeared as the holders of these shares, the Union Bank could not have said to Plaintiff "You are a shareholder and liable in respect of these shares."

I have

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I have next to consider how the case stands, when the book is produced, containing the special entry, that the transfer made to Mr. *Thew* was invalid by reason of its not having received the sanction of a board of directors. When was that entry made? Why not till after the contest had arisen between the Plaintiff and the company. So that *post litem motam* between these parties, the Defendants, the *Newcastle Bank*, think fit to alter their book, for the very purpose of introducing the Plaintiff's name as a shareholder, and they then make a new return to the stamp office containing his name as a shareholder. How can that avail them? How can they be allowed, by their own act, to take upon themselves to determine the question at issue between them and the Plaintiff? If they could do it then, when was their power of altering their books to cease? They might do it after suit, nay after the cause was in the paper. To hold that they could do it at all after the contest had arisen, is to hold that they may alter their own books, at any time, for the purpose of suiting their own interests, at their own individual pleasure. They might possibly contract for such powers to be intrusted to them, but I should require the strictest proof that a shareholder to be prejudiced by this power had knowingly entered into such a contract.

I asked, during the argument, where any such authority is to be found in the deed, and it was admitted that there was no express and distinct authority. It was, however, said, that by the 85th clause it is provided, that the board of directors alone shall make entries, erasures or alterations; and by the 156th clause, every such entry, erasure and alteration, which upon the acquisition of any shares shall have been made, shall be conclusive on the last shareholder. This is confined to the occasion of the acquisition of shares, and does not
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give the board of directors a power of transferring shares from the name of one person to another, as they, at their own will and pleasure, may think fit.

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It was urged with truth that the power of directors to make alterations for the purpose of preventing errors was incidental to their office, as, for instance, suppose a person's name had been entered as *Walter* instead of *William*, they would have power to set it right; I think that such a power would be incidental to their office as a board of directors, but that it does not extend to empower them to vary the rights between parties. Observe what the consequences of such an alteration in this book would lead to. Mr. *Thew* being the shareholder in the share register, the board of directors say, we will make Mr. *Shortridge* the shareholder and the owner of these shares. How can they put Mr. *Thew* or Mr. *Shortridge* in the same position they were in before? A contract had been entered into between them, and one had paid a large sum of money for the purchase of these shares. Mr. *Thew* might say, "I insist on being a shareholder of the bank, for I think it likely to be profitable." It is obvious that the fact that the bank was in a failing condition cannot alter the question; for if the directors have power to make these alterations, they, not having made the entry in the first place according to the directions and mode pointed out by the deed of settlement, might, of their own will and pleasure, or from any motive, afterwards alter it, as they thought fit, in favour of any other person.

It is settled, as it appears to me by a variety of cases, that Mr. *Thew* could not have resisted being made a contributory, in case this Company had been brought within the provisions of the Winding-up Acts. He had in fact paid for the shares; he had applied for

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and obtained the certificate of being the holder of the shares; he had received dividends, and had acted at public meetings as the owner of these shares. If Mr. *Shortridge* was a shareholder in respect of these shares, he also could be made a contributory in respect of them, there would then be two persons liable as contributories with respect to the same shares. Nothing that I shall say will affect in the slightest degree the case of *Bosanquet v. Shortridge* and *Morgan's* case, both of which I consider to be binding on me. The question at law and that before me are perfectly distinct. The question here is, whether the contract entered into between the Plaintiff and the company is not such, that at the time when the contest arose between them, at the end of 1847, he had not ceased, as between himself and the company, to be a shareholder of the company: and if so, whether they, by any act of theirs, can make him a shareholder of the company subsequently to that period. I am of opinion that they cannot. I do not minutely examine the evidence with respect to several observations which have been made upon that part of the case—I rather put it upon the construction of the contract they have entered into, because in my opinion this is a case that must be tried by the contract, and the equities arising out of the contract, which has been entered into between the Plaintiff and the Union Bank.

The conclusion to which I come, on the first question, is, that the Plaintiff was not a shareholder of the company at the end of 1847, and that the fact of the directors having since put his name on the list has not made him one. With respect to that point I am therefore prepared to make a declaration that he is not now a shareholder of the company.

The next question requires little to be said upon it, for
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that this was the action of the *Newcastle Bank* is manifest, and the evidence is conclusive upon the subject. Mr. *Watson*, on behalf of the *Newcastle Bank*, writes to Mr. *Roy* on behalf of the *London and Westminster Bank*, and proposes, that the latter shall bring an action, and he says he will send them a list of the names of the parties to be sued: and this action, though a mode of endeavouring to enforce and establish the liability of the Plaintiff to the *London and Westminster Bank*, was brought at the request and at the instance of the *Newcastle Bank*: there is in truth no concealment about it, for the Defendants openly state the nature of the transactions between them. The proceeding is one in which the *London and Westminster Bank* act by the desire of the *Newcastle Bank*; and when the Plaintiff's name is sent as one of the persons to be sued, the *London and Westminster Bank* ask, whether they can usefully do it at that time, as the name of Mr. *Shortridge* does not appear in the return to the Stamp Office. Afterwards the book is altered, and another return made, including the Plaintiff's name, for the purpose of enabling the action to be brought. It is throughout stated that the action was that of the *Union Bank* in every respect except one, viz. the Defendants say, that the money recovered in the action was to be paid to the *London and Westminster Bank*, and not to the *Newcastle Bank*; and that the *Newcastle Bank* having applied to receive the money recovered in this action, the *London and Westminster Bank* declined to allow it, and thence it is said, you must try it by this test, and hold that it is the action of the parties who recover the money. It is plain, however, that the money was to be applied in payment of a debt owing by the *Newcastle Bank*; it was therefore in effect a payment made on account of the *Newcastle Bank*, and it is immaterial whether it was paid to the *Newcastle Bank* direct, or to a creditor of the *Newcastle*

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Bank in discharge, *pro tanto*, of a liability of that bank. It is in fact exactly the same thing. The action was instituted by the *London* and *Westminster* Bank, indemnified against all costs and consequences by the *Newcastle* Bank, for the purpose of trying this question. The *Newcastle* Bank no doubt obtained great advantages by that mode of proceeding, because they tried the question against the Plaintiff as if they stood in the position of a creditor of their own bank; but in my opinion they cannot be allowed to do so, but must, in this Court, be bound by those equities upon which I have already expressed my opinion.

The result is, that as I entertain no doubt but that from the beginning to the end this was the action of the *Newcastle* Banking Company, brought by the *London* and *Westminster* Bank, at their desire, for their own purposes, and in order to effect their own objects, there must be a perpetual injunction to restrain the levying execution upon this judgment. Mr. *Shortridge* must pay the *London* and *Westminster* Bank their costs of the suit, and add them to his own costs, and have them over against the *Newcastle* Banking Company, and there must be a declaration that the Plaintiff has ceased to be a partner.

April 21.

BROCKLEHURST v. FLINT.

A testator gave a fund to four persons or any of them, in such shares, &c., as A. B. should appoint, and in default equally. He directed that such four persons should bring into hotchpot the amount of advances he might make to any of them in his life. Held, that the hotchpot clause operated only on the unappointed fund, if any.

THE testator directed his trustees to pay the produce of his real estate to *John Gaunt*, *Matthew Gaunt*, *Mary Gaunt* and *Josiah Gaunt*, or to any of them exclusively of the others, in such shares as his widow should appoint, and in default of appointment, to pay it to them equally.

And

And after reciting that he had advanced divers sums to *Matthew*, and might probably make some advances to *John*, *Mary* and *Josiah*, he directed, that their shares, respectively, should be chargeable, and he charged them with the repayment, for the benefit of the others, of such advances, with interest, "so and in such manner as, on a correct statement of accounts, they may respectively have an equal share of such monies."

1852.

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BROCKLE-
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The widow appointed, that without any deduction or abatement whatsoever, for or in respect of any money paid or applied to or for their benefit or for their preferment in the world, the fund should be divided between *Matthew*, *John*, *Mary* and *Josiah* equally. Advances had been made by the testator to some of the appointees.

It was contended, on the one side, that the hotchpot clause related only to the unappointed shares, for otherwise the power of appointment in unequal shares would be destroyed, and on the other hand, it was argued, that the appointees could take no part of the fund without first accounting for the amount of the advancements.

Mr. R. Palmer and *Mr. Bazalgette*, for the Plaintiffs.

Mr. Faber, *Mr. W. M. James*, *Mr. Prior*, *Mr. Roupell* and *Mr. Giffard*, for the other appointees.

Mr. C. Hall and *Mr. Dickinson*, for the trustees:
Peddie v. Peddie (a) was cited.

The MASTER of the ROLLS.

It is said, that if the advancements made by the testator

(a) 6 Sim. 78.

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tor are to be brought into hotchpot, the effect will be to revoke the power of distribution given to the widow. To this it is answered, that this is not necessarily the case, for the revocation will be only *pro tanto*, or for the amount of the advancements. This, however, in substance, amounts to the same thing, for if it was intended that the widow should only have a power of appointment, subject to the sums advanced, it would fetter her power and prevent her appointing what she pleased to any child whom the testator had advanced by way of portion.

If the Court can make all parts of the will consistent, it is bound to do so, and for that purpose, it must look at the whole scope of it, in order to ascertain the real intention of the testator. Looking at the will in that view, I think it may be so construed as to produce no inconsistency, by limiting the operation of the clause to that part of the fund unappointed by the widow, so that the fund will go in such way as the widow shall appoint, but in default of appointment, the objects shall take equally, after bringing their advancements into hotchpot. The testator did not, I think, intend to fetter the discretion of his widow, or to prevent her disposing of the fund amongst the objects, in such way as she might think fit; but he desired that if she did not execute the power, then they were to take equally, after accounting for the sums which he had advanced them in his lifetime.

Reading the will in that way, there is neither a revocation of the power nor any inconsistency.

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WARDE v. WARDE.

May 3.

IN 1834, Mr. *Warde*, on his marriage, charged his *Warwickshire* estate with a jointure rent charge of 1,000*l.* in favour of the Plaintiff, his wife, for her life, if she should survive him. The settlement contained a power for Mr. *Warde* to substitute any other estate, of ample value, in lieu of the estate so settled.

In 1844, Mr. *Warde* contracted for the purchase of the *Luton Hoo* estate for 150,000*l.*, and to enable him to pay the purchase money, he contracted to sell the *Warwickshire* estate, and by a deed, dated the 26th of September, 1845, Mrs. *Warde* released her jointure on the *Warwickshire* estate, and Mr. *Warde* covenanted to charge "a competent and sufficient part of such manors, messuages, &c., &c., and real estates, as he should there-after acquire," with a rent charge of 1,000*l.* a year, in lieu of the jointure so released by his wife.

Mr. *Warde* afterwards paid a considerable part of the purchase money of the *Luton Hoo* estate, but before the whole had been paid, and before any conveyance had been made to him, he, in 1847, contracted to sell that estate to Mr. *Leigh* for 157,000*l.*, and a considerable part of the purchase money was now in Court in another suit.

A wife had a jointure secured on her husband's estate X. In 1844, the husband contracted to purchase an estate Y., and to enable him to sell the estate X. the wife, in 1845, released her jointure, and he then covenanted to secure it out of "estates he should there-after acquire." Before the estate Y. had been conveyed, the husband contracted to sell it. Held, that in equity, the estate Y. was charged with the jointure.

A covenant is to be construed most strongly against the covenantor.

This bill was filed by Mrs. *Warde* against her husband, her trustees and the purchaser of the *Luton Hoo* estate, to establish her jointure charge of 1,000*l.* a year upon that estate or on the purchase money. The bill did not pray any rectification of the deed of 1845, but it

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was alleged and appeared, that the original draft of the deed of 1845 charged the *Luton Hoo* estate with the 1,000*l.* a year, but it was altered by the Conveyancer and general words were substituted.

Mr. *Stuart* and Mr. *Dickinson*, for the Plaintiff, cited *Wellesley v. Wellesley (a)*.

Mr. *Roupell* and Mr. *Messiter*, for the trustees.

Mr. *Lloyd*, for the purchaser.

Mr. *Roupell* appeared for Mr. *Warde* the principal Defendant, and contended, that the covenant did not extend to the *Luton Hoo* estate, which was not an "after acquired estate," it having been contracted for prior to the date of the covenant and it never having been conveyed to him.

The MASTER of the ROLLS.

The question is, whether, on the proper construction of this deed, the *Luton Hoo* estate is included in the covenant, and is an estate on which the jointure is to be fixed. I am of opinion that it is.

The circumstances of this case are these:—Mrs. *Warde* had a jointure rent-charge on the *Warwickshire* estate, and the Defendant, having purchased another estate in *Bedfordshire*, called the *Luton Hoo* estate, was desirous of selling the *Warwickshire* estate for the purpose of providing the money to pay for the purchased estate. The marriage settlement, which charged the *Warwickshire* estate with the jointure, contained a power to substitute

stitute other estates for the *Warwickshire* estate; and to avoid the expense of satisfying the purchaser of the *Warwickshire* estate that the estate to be substituted was a sufficient security for it, it was obviously the better course to release the estate entirely from the jointure, and for the husband to enter into a covenant by which he should charge the *Luton Hoo* estate or his subsequently acquired estates with this jointure.

Instructions were given to Mr. *Humphry* for that purpose, and to secure it on that *Luton Hoo* estate; and without any change in the instructions, or any thing to show any alteration of intention of the parties, he strikes out the *Luton Hoo* estate, and says, "all the estates he should thereafter acquire."

The question, upon the proper construction of this covenant, is, whether the *Luton Hoo* estate is included therein. The argument is this:—that the husband, in 1845, was in equity owner of the *Luton Hoo* estate, and that it therefore cannot be included in the term "after acquired estate," even if that were the intention of the parties at the time. The principle of construction of covenants is, that they are to be construed most strongly against the covenantor, and most beneficially in favour of the covenantee. Now he had not acquired this estate at law, though he had in equity; that is to say, as between the vendor and purchaser, the Court holds that done which ought to be done; but he had acquired it in no other sense as between himself and the covenantees. The acquisition of the estate was in course of operation; it was going on, and was afterwards to be finally completed. Though he had acquired this estate as between himself and the vendor, I am of opinion, that, on the proper construction of this covenant, the *Luton Hoo* estate was included. That seems to

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to have been the view of Mr. *Humphry* when he prepared this covenant. He did not consider he was excluding this estate by altering the draft and making it "estates as he should thereafter acquire," but he contemplated the purchase going off and the money being laid out on another estate.

I think this is the proper and obvious construction of the covenant, and I am prepared to make the declaration, that the *Luton Hoo* estate and the purchase money for it are subject to the covenant.

May 4.

MAXWELL v. MAXWELL.

A testator domiciled in *England* and having real and personal estate there, besides Scotch heritable bonds, devised and bequeathed "all his real and personal estate, whatsoever or wheresoever," upon trusts, under which his heir took benefits. The will had no operation on the heritable bonds, which descended to the Scotch heir. Held, by the Master of the Rolls and affirmed by the Lords Justices, that the heir was not bound to elect.

THIS was a special case.

The testator being domiciled in England, and having Scotch heritable bonds, and real and personal estate in *England*, made his will in 1851, whereby, "by virtue of every right, power, or authority, enabling him in that behalf," he "gave, devised and bequeathed" to trustees "all his real and personal estate, whatsoever or wheresoever," upon trust for his wife for life, with remainder for all his children, their heirs," &c.

The testator died on the day on which he made his will. The heritable bonds did not pass thereby, but descended on his eldest son and heir, for, by the Scotch law, the will was inoperative as to real estate, by reason of the omission of the word "dispone," and of a proper attestation clause, stating the place and date of its execution,

cution, and the names and descriptions of the writer and witnesses. And even if the will had been executed with the requisite formalities as to real estate, still, by the Scotch law, it might have been set aside by the heir, so far as it affected heritable property in *Scotland*, on the ground of its having been executed on death-bed. But this did not prevent the law of approbate and reprobate being set up against the heir at law, if personal estate were given to him by the same instrument. The Scotch law of approbate and reprobate, as applicable to such a case, was stated to be the same as the English law of election.

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The question was, whether the heir was bound to elect between the heritable securities and the benefits given him by the testator's will.

Mr. *J. Anderson* and Mr. *Fleming*, for the Plaintiffs, the younger children, insisted, that the words used clearly showed an intention that all the testator's property, whatsoever or wheresoever situate, should pass by the will, and that it would be a strange construction to hold, that bonds were not included in the word "whatsoever," or that *Scotland* was not included in "wheresoever." That *Allen v. Anderson* (a) had been decided on an assumed analogy between copyholds and Scotch estates, which did not exist, and that by the Wills Act, both copyholds and leaseholds would pass by general words.

Mr. *R. Palmer* and Mr. *Bagshawe* relied on *Johnson v. Telford* (b), and *Allen v. Anderson* (c), as distinct authorities, and they referred to the doctrine as to powers,
 in

(a) 5 *Hare*, 163. (b) 1 *Russ. & Myl.* 244. (c) 5 *Hare*, 163.

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Mr. *Witham*, for the trustees.

Mr. *Anderson*, in reply.

The following authorities were also cited, *Gainer v. Cunyngham* (a); *Gibson v. Macbain* (b); *Brodie v. Barry* (c); *Loudon v. Loudon* (d); *Trotter v. Trotter* (e); *Dundas v. Dundas* (f); *Bennet v. Bennet's Trustees* (g); *M'Call v. M'Call* (h); *Churchman v. Ireland* (i); *Dummett v. Pitcher* (k); *Rich v. Cockell* (l); *Hearle v. Greenbank* (m); *Welby v. Welby* (n); The Wills Act (o).

The MASTER of the ROLLS.

I am of opinion that this case is concluded by the authorities which have been cited; and whatever opinion I might have formed, in the absence of these cases, I think I am concluded by them.

The question is this:—whether on the will, as stated in this special case, the general words, “all my real and personal estate whatsoever or wheresoever, whether in possession or reversion,” are sufficient to raise a question of election against the heir at law, in respect to heritable bonds in *Scotland*. *Johnson v. Telford* and *Allen v. Anderson* appear to me to be cases which I cannot

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| (a) 1 <i>Bli. O. S.</i> 27, n.; <i>S. C.</i> | (h) <i>Drury</i> , 283. |
| 1 <i>Mor. Dic.</i> 617. | (i) 1 <i>Russ. & M.</i> 250. |
| (b) 1 <i>Mor. Dic.</i> 620. | (k) 2 <i>Myl. & K.</i> 262. |
| (c) 2 <i>Ves. & B.</i> 127. | (l) 9 <i>Ves.</i> 369; and see 2 |
| (d) <i>Hume's Decisions</i> , 23. | <i>Roper on Legacies</i> , 1582, 1595. |
| (e) 3 <i>Wils. & Sh.</i> 407, and 4 | (m) 3 <i>Atk.</i> 715, and 1 <i>Ves.</i> |
| <i>Bli. N. S.</i> 502. | <i>sen.</i> 298. |
| (f) 2 <i>Dow. & Cl.</i> 349. | (n) 2 <i>Ves. & B.</i> 187. |
| (g) 7 <i>Shaw & D.</i> 817. | (o) 1 <i>Vict. c.</i> 26, s. 27. |

cannot in substance distinguish from the case now before me. *Allen v. Anderson* was the case of a testator who had disposed of all the real and personal property he might be seised or possessed of up to the time of his death. He had, at the date of his will, a debt for which a heritable bond was afterwards given. The question was, whether this raised a question of election against the heir, and Sir *James Wigram* having held, that the case of *Churchman v. Ireland* removed all question as to whether the words of that will included the heritable bond given subsequent to the date of the will, was of opinion, that the case became much the same as the present, and thereupon, after commenting on *Brodie v. Barry*, he states (without relying on the case of *Johnson v. Telford*) that he considers himself bound by the previous authorities. I think it proper to state that I am not entirely satisfied with the reasoning of Sir *James Wigram* on that subject, but I concur in the concluding passage of Lord *Eldon's* observations which has been read to me (laying down that which I shall follow while sitting here) that it is infinitely better to follow settled rules and principles, when they are not contradicted by other decisions, than to vary them on any notion of expediency, or that the contrary would be a better rule of law for the Court to have adopted in the first instance.

Sir *James Wigram* appears to me to have proceeded very much on this foundation:—that to raise a case of election against the heir, in cases where there was some act to be done in order to enable the will to operate, it was as necessary to have the testator's property specifically pointed out by the will, as it would be in the case of a disposition of the property of a stranger. Of course nobody could contend that a devise of "all my real and personal estate whatsoever" would pass a sum
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of stock belonging to a stranger in the funds, and yet there is no question that if a testator expressly disposed of stock in the funds belonging to a stranger, a case of election would arise if he gave the same stranger benefits by his will.

Sir *James Wigram* seems to have thought, that in order to raise a case of election, where the testator attempts to dispose of his own property, it required that it should be as specifically pointed out, in the case of the property of a stranger. He refers to the case of an estate tail, to the case of copyholds not surrendered to the uses of the will prior to Mr. *Preston's* statute, and to the case of a joint owner, who could not dispose of his interest without having previously done some act. He then seems to have assumed, that it was necessary to have done some prior act, in order to enable the Scotch property to pass by the will. But from what Mr. *Anderson* has stated, if that were the opinion of Sir *James Wigram*, he was in error on that view of the case, for the will might have been so framed as to pass the property directly. The words which Sir *James Wigram* uses in the reported case (a), after referring to the case of *Brodie v. Barry*, are these, "Now as a general devise of, all my real estate in *England*, would not have the effect even of a devise or of a declaration of uses of copyholds not surrendered to the uses of the will, so in the case of Scotch lands, a devise of all his real estate by a testator would not have the effect, by way of devise or declaration of uses of lands in *Scotland*, which had not been previously conveyed in such manner as to allow the land to operate upon them." Sir *James Wigram* seems to have thought, that in order to enable the will to operate on the lands in *Scotland*, it was necessary that they should have been conveyed in some manner

(a) 5 *Hare*, 169.

manner previously to the will, and by that means the analogy between Scotch lands and copyholds was made perfect. If that were his view of the case, the reasoning might not (according to what has been stated by Mr. *Anderson* to me) be perfectly satisfactory; but the facts of the case on which Sir *James Wigram* gave his decision, after care and deliberation, are not distinguishable from the present. The preliminary difficulty in the case was got over by the case of *Churchman v. Ireland*, and I cannot distinguish the present case from that, which in fact is a decision, that a general devise of land "whatsoever and wheresoever," will not raise a question of election against the heir, in respect of real estate in *Scotland*, not specifically pointed out by the will.

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It is also to be observed, that Sir *James Wigram* had the case of *Bennet v. Bennet's Trustees* before him—he expressly refers to it. I have attended carefully to the authorities, but no decision has been cited, which touches this question, with the exception of *Bennet v. Bennet's Trustees*; *Allen v. Anderson*, and *Johnson v. Telford*. In every one of the cases, of which there were a great number, the property was either specifically referred to, or there were expressions used in the will which showed conclusively, that the testator believed he was disposing of the property in question. *Johnson v. Telford* appears to me to be exactly this case; it is true that Sir *John Leach* says, that his will cannot affect his Scotch estates, and that some of the uses expressed in his will cannot be applied to Scotch property; but if that be so, I am unable to see why the same observation does not apply to the present will. Sir *John Leach* says (a), "in the case of *Brodie v. Barry*, the Scotch estate was mentioned in the will, and expressly intended

(a) 1 *Russ. & Myl.* 248.

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tended by the testator to pass thereby. In this will no notice whatever is taken of the Scotch estate, and the question is, whether it is clearly to be collected, from the general words used, that the testator meant to pass his Scotch estate to the uses of his will. Where a testator uses only general words, it is to be intended, that he means those general words to be applied to such property as will, in its nature, pass by his will, and to the uses therein expressed." That is certainly applicable to the present case, and he expressly states, therefore, that the coheirs are not to be put to their election between the Scotch estate and the bequests given them by the will.

These two cases I cannot distinguish from the present, and without going into any of those refined distinctions I consider myself bound to follow them. It may probably be very desirable that this case should go to a higher tribunal, in order that the law on the subject may be definitively settled by a Court having the power of correcting any decision of the inferior Courts which it considered had proceeded upon a wrong foundation or principle.

It is possible the testator may have intended the whole of the property which he possessed, in every country in the world, should pass, though he has not used words to carry that intention into effect. These two cases expressly determine, that the words "whatsoever or wheresoever" are not sufficient.

I do not decide this on the doctrine to be found in some of the early cases, that it requires express and clear words to raise a case of election against the heir, because I apprehend, that in every case to raise a case of election, words must be used which show distinctly
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what the testator's meaning is, and this applies as much to any other person as to the heir.

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I shall make the declaration accordingly, and will give leave to amend the case by stating the Scotch law on the subject.

The MASTER of the ROLLS, in a later period of the day, added,—I omitted to state, that one of the grounds on which I proceeded, in *Maxwell v. Maxwell*, was the fact, that there was real property in this country on which the will might operate, and I adopted, to some extent, the analogy between the case of the execution of powers, where a distinction is taken between the case in which there is property upon which the devise may operate, and where there is none (*a*).

(*a*) Affirmed by the Lords Justices, 4th Nov. 1852—2 *De G. M.* & G. 705.

Re DUFAR AND BLAKENEY.

May 8.

BY the certificate of the Taxing Master 158*l.* was found due from the solicitors to Mr. *Dolman*, and on a previous occasion, the Court had ordered substituted service of a copy of the certificate at their offices and private residences, and that demand of payment there should be good.

Solicitor, from whom a sum was found due, ordered to pay all the costs of proceedings to compel payment.

Whether it is necessary in demanding payment by attorney to leave a copy of the power of attorney, *semble* not.

Mr. *Elderton* now moved for the short order for pay-

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Re

DUFUR

and

BLAKENEY.

ment and delivery up of the deeds and papers. He asked for all the subsequent costs, *Re Bainbrigge* (a).

M. Smythe, *contra*, objected, that no copy of the power of attorney to receive the amount had been left, and he contended that this was necessary. He cited *Veal's Forms* (b); *King v. Packwood* (c); *Doe dem. Cope v. Johnson* (d); and contended that *Re Bainbrigge* did not apply.

The MASTER of the ROLLS.

I think the applicant is entitled to the order. He has done all that is required by the order for substituting service. I give no opinion whether it is necessary to leave a copy of the power of attorney; but if such be the practice, it is new both to me and the Registrar.

On the authority of *Re Bainbrigge* the solicitors must pay all the subsequent costs in compelling payment.

(a) 13 *Beav.* 108, and 14 *Beav.* 645.

(b) Page 123.

(c) 2 *Dowl. P. C.* 570.

(d) 7 *Dowl. P. C.* 550.

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SMITH v. PARKES.

April 28, 30.

May 24.

IN 1845, a partnership which had previously existed between *Smith, Parkes* and *Brookfield* was dissolved, and by the deed of dissolution, dated the 7th of *April*, 1845, and subject to certain deductions therein mentioned, *Parkes* was entitled to receive from *Smith* and *Brookfield* 5,750*l.* for the good will, and 2,125*l.* for his share of the profits. *Witham* thereupon joined the partnership.

Assignees of a chose in action are liable to all the equities which attach to the thing assigned as against the assignor.

A retiring partner received security from the continuing partners for his share, and which he assigned to third parties.

Held, that the assignees took subject to the right of equitable set-off of the continuing against the retiring partner; Held, also, that the assignees having assented to a substituted security in 1846, in lieu of a prior one in 1845, were subject to all the equities existing at the date of the second security.

Equitable right of set-off enforced after a judgment at law.

On the 30th of *April*, 1845, *Parkes* agreed to assign the interest which he took under this deed to the Defendants *Lucena* and others. Disputes afterwards arose between *Smith, Parkes* and *Brookfield*, and in *December*, 1845, bonds were given by *Smith* and *Brookfield* to secure the amount due to *Parkes*, and which he deposited in like manner for the benefit of *Lucena* and the persons interested under the former agreement of the 30th of *April*. Actions were subsequently brought in the name of *Parkes* on the bonds, but on the 23rd of *December*, 1846, an arrangement was come to between the continuing partners and *Parkes*, by a deed dated the 23rd of *December*, 1846, whereby *Smith, Brookfield* and *Witham* covenanted to pay the sums therein mentioned. This deed was given in substitution for the former deeds and bonds, *Lucena* and the others in the same interest accepted this deed of 1846 in lieu and substitution of the former securities, and the actions which had been previously brought by them in the name of *Parkes* on the bonds were discontinued.

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Fresh difficulties afterwards arose under the deed of 1846, which were determined by arbitration.

In 1848, *Smith*, by the death of *Witham* and the insolvency of *Brookfield*, became the sole surviving member of the firm; and after he had made some payments under the deed of 1846, *Lucena* and the other assignees of *Parkes's* interest brought an action at law against him in the name of *Parkes*, to recover the amount remaining due under the deed of 1846; whereupon the Plaintiff, *Smith*, instituted this suit, alleging that at the date of the deed of 1846, *Parkes* was indebted to *Smith*, *Brookfield* and *Witham* in sums amounting altogether to about 2,318*l.* for money lent, and for a mortgage debt and business transacted, and he insisted on his right to set off these sums against the amount due on the covenant contained in the deed of 1846.

Pending the suit *Parkes* obtained judgment in the action.

Mr. *R. Palmer*, Mr. *Baggallay* and Mr. *Sidney Smith*, for the Plaintiff.

Mr. *Lloyd* and Mr. *W. H. Clarke*, for *Parkes*, contended, that there was no equitable right of set-off. That the rights were merely legal and had been determined by the action at law.

Mr. *Freeling*, for *Lucena* and others, argued, that whatever question of set-off there might be, as between the Plaintiff and *Parkes*, it did not affect *Lucena*.

Mr. *Follett*, for the assignee of *Brookfield*.

Mr. *Baggallay*, in reply.

Vulliamy

Vulliamy v. Noble (a); *Rawson v. Samuel* (b); *Clark v. Cort* (c); *Addis v. Knight* (d); *Watts v. Christie* (e); *Baillie v. Edwards* (f); were cited.

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The MASTER of the ROLLS, at the close of the argument, expressed his opinion on the principal points in the case, and stated, that he was of opinion that the Plaintiff (the sole surviving member of the partnership firm of *Smith, Witham and Brookfield*) was entitled, in equity, to set off against the debt established against him at law by the Defendant *Parkes*, such sum as *Parkes* owed to the firm of *Smith, Witham and Brookfield*. He also stated his opinion, that the other Defendants to whom *Parkes* had assigned his interest in and his claim against the firm, under the deed of dissolution, were also bound to allow such set-off, to the extent of all debts due to the firm from *Parkes*, at the time the assignment was made to them; but he reserved his opinion on the question, whether the Plaintiff was entitled to set off the debts incurred by *Parkes* subsequently to that period.

The MASTER of the ROLLS.

May 24.

It is, I think, clearly established, that notice of the deposit of the deed and of the assignment of *Parkes's* interest to the other Defendants was given by Mr. *Bower* as soon as it took place. The letters which were read establish this fact: the names of the assignees in equity are undoubtedly not mentioned, but this is not material;

- (a) 3 *Mer.* 618.
- (b) *Cr. & Ph.* 161.
- (c) *Ib.* 154.

- (d) 2 *Mer.* 117.
- (e) 11 *Beav.* 546.
- (f) 2 *H. L. C.* 74.

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material; the fact that *Parkes* had assigned his interest, such as it was, to third persons, is clearly stated and was evidently known to *Smith*, *Witham* and *Brookfield*.

It remains to be considered what the value or importance of that notice is, as regards the present contest between the parties. The first deed of dissolution bore date the 7th *April*, 1845, and by it, subject to the deductions therein mentioned, *Parkes* was entitled to two sums, one of 5,750*l.* for good will, and another sum of 2,125*l.* for past profits. On the 30th of the same month, the interest which *Parkes* took under this deed was agreed to be assigned to several of the Defendants in the cause. Afterwards, in *December*, 1845, bonds were given to secure the amount due, and were deposited with Mr. *Bower*, in like manner, for the benefit of the persons interested under the former agreement of the 30th *April*. Subsequently, on the 23rd of *December*, 1846, the final arrangements were come to between the continuing and the retiring partners. This deed of the 23rd *December*, 1846, was given in substitution for the former deed and bonds, and was deposited with Mr. *Bower* for the benefit of the same persons, the assignees of *Parkes's* interest in the firm. The facts in evidence establish, clearly, that the assignees of his interest have accepted this deed of 1846 in substitution of the former deed, as the security assigned to them. It is not and could not, consistently with the facts, be urged by them, that the agreement of the 7th *April*, 1845, or the bonds of *December*, 1845, constitute the security assigned to them, and that the Plaintiff and other continuing partners having notice of that assignment could not vary it without the consent of the Defendant. On the contrary, it is established, that the deed of 1846 was adopted and accepted in lieu of the previous claim of *Parkes*, and the actions which had been previously brought on the bonds were discontinued. These De-

fendants

defendants also are the persons who, in the name of *Parkes*, are suing the Plaintiff at law, and who contend that whatever questions of set-off there may be, as between the Plaintiff and *Parkes*, it does not affect them. It is therefore clearly established, that the interest assigned to these persons is the interest secured to *Parkes* by the deed of 23rd of December, 1846. It remains to be seen what that interest is, because whatever it is, that and no more is what is assigned to them. Neither can they allege, as it appears to me, that they are not bound by the equities which affect Mr. *Parkes*, their assignor. At law, they have no title, and can only sue in the name of Mr. *Parkes*. In equity, they are the assignees of a *chose in action*, and, as such, are liable to all the equities which attach to the thing assigned as against the assignor^(a). Undoubtedly, if subsequently to the date of this deed of 23rd December, 1846, Mr. *Parkes* had incurred debts to the firm, as, for instance, if he had received money from the firm in part payment of his interest, without the sanction or knowledge of the assignees of his interest in the partnership, the continuing firm, having notice of such assignment, could not treat such payments to Mr. *Parkes* as binding upon his assignees, or as *pro tanto* discharging the debt due to him, as between the Plaintiff and the assignees of it. But this I do not understand to be the case. All the debts sought to be set off against the Defendant *Parkes* are debts either actually due from him at the time of the execution of the deed, or flowing out of and inseparably connected with his previous dealings and transactions with the firm. Of this latter nature are the costs of the arbitration under the deed itself. I am of opinion, therefore, that they are bound by the same right of set-off which I have stated affects

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(a) *Pruday v. Rose*, 3 Mer. 86; *Ord v. White*, 3 Brev. 357.

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affects the Defendant *Parkes*, and which extends to all sums, other than those paid subsequently to the deed of the 23rd of *December*, 1846, to or by the order or for the use of Mr. *Parkes*, without the knowledge and sanction of the Defendants, the assignees of the debt. To some extent it is established by the evidence, that debts existed previously to the 23rd of *December*, 1846, but I have not been able to ascertain the exact amount. If the parties can agree upon the amount, execution on the judgment must be stayed on payment of the balance into Court. If this cannot be settled by arrangement, I shall order the injunction to issue, on payment into Court of a sum of 1,000*l.*, the probable amount due, and direct the accounts to be taken.

May 28.

FORD v. WHITE.

A party taking an equitable mortgage with notice of prior equitable mortgage, cannot, by assignment to another without notice, give him a better title.

IN 1837, Colonel *Copland* mortgaged some leasehold property situate in Middlesex to *White*, and there was no question as to this being the first mortgage.

In 1838, *Copland* mortgaged the same property to *Ford*, the Plaintiff.

On

Property in *Middlesex* was mortgaged to *A.*, and afterwards to *B.*, and subsequently to *C.*, with notice of *B.*'s incumbrance. *C.* registered before *B.* and afterwards assigned to *D.*, who had no notice of *B.*'s mortgage. Held, that the interests being equitable, *D.* had no priority over *B.*

The assignees of a bankrupt mortgagor who had no assets disclaimed, and said, that they would have disclaimed before suit, if any application had been made to them. Held, nevertheless, that they were not entitled to costs.

DATES.

1837.	Mortgage to <i>White</i> .	1842, May 26.	Registry of <i>Parkes</i> .
1838.	Second mortgage to <i>Ford</i> .	1842, July 15.	Do. <i>Ford</i> .
1842, May 9.	Third mortgage to <i>Parkes</i> .	1845.	<i>Parkes</i> assigns to <i>Paget</i> .

On the 9th of *May*, 1842, *Copland* mortgaged the same property to *Parkes*, who registered his security on the 26th of *May*, 1842, while *Ford's* security remained unregistered until the 15th of *July* following. *Parkes* afterwards, in 1844 and 1845, assigned his interest to *Paget* and others. The mortgagor *Copland* became bankrupt.

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The Plaintiff filed this bill to redeem *White*, and to establish a priority over *Parkes* and those claiming under him, upon the allegation that *Parkes*, whose security had priority over *Ford's* on the registry, had notice of the Plaintiff's mortgage at the time he, *Parkes*, obtained the mortgage from *Copland*. The evidence established such notice in *Parkes*, but not in *Paget* and the other persons claiming under *Parkes*.

One of the witnesses stated, that before the execution of the deed of 1842, *Parkes* pressed *Copland* for a security for his debt, and said, " 'Colonel, you must give me a mortgage on your *Tothill Fields* property.' To which the Colonel replied, 'I'll give you a mortgage for what you like, as my brother-in-law and Mr. *Ford* (the Plaintiff) have mortgages which will swamp all the property.' " To which *Parkes* replied, 'Never mind; I want the mortgage.' *Parkes*, on a subsequent occasion, said to the witness, "I have done old *Ford*. I found, on inquiry, that he had not registered his mortgage, so I went in immediately and registered mine, so that now my security is good."

One of *Copland's* assignees was examined on behalf of the Plaintiff as a witness in the suit. The assignees by their answer said, that the property was not worth the incumbrances; that they had no assets to pay their costs.

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costs. They disclaimed all interest, and said, they would have disclaimed before suit, if the Plaintiff had made any application to them.

Mr. *Willcock* and Mr. *Toller*, for the Plaintiff.

Mr. *Baggallay*, for *Parkes*.

Mr. *R. Palmer*, Mr. *Tripp* and Mr. *Prior*, for the parties claiming under *Parkes*. The notice has not been satisfactorily proved; for to "overturn an Act of Parliament," intended to exclude parol evidence, the "proof must be extremely clear;" for "apparent fraud or clear and undoubted notice would be a proper ground for relief; but suspicion of notice, though a strong suspicion, [is] not sufficient to justify the Court in breaking in upon an Act of Parliament," *Hine v. Dodd*(a). In *Jollands v. Stainbridge*(b), Lord *Alvanley* observes, "I must admit now, that the registry is not conclusive evidence; but it is equally clear, that it must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situation of the persons having the prior deed, and knowing that registered, in order to defraud them of that title he knew at the time was in them." Nothing less, therefore, than the clearest notice, amounting to fraud, will postpone the prior registered deed.

They also argued, that the parties claiming under *Parkes*, having no notice themselves, were not affected by the notice to *Parkes*. On this point *Peacock v. Burt*(c) and *Elsey v. Lutyens*(d) were cited.

Mr.

(a) 2 *Atk.* 275.

(b) 3 *Ves.* 485.

(c) *Coote on Mortgages*, 2nd

ed. p. 693.

(d) 8 *Hare*, 159.

Mr. *Craig* and Mr. *Schonberg*, for *White*.

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Mr. *Chandless*, for the assignees of *Copland*.

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*The MASTER of the ROLLS.*

The first question is, whether it is proved that *Parkes* had notice of the Plaintiff's mortgage. On that subject I have been referred to several cases, to show that there should be clear evidence of notice. That is so; but all that is meant is, that the notice proved, in this, as in all other cases, must be sufficient to satisfy the Court, and then it must be acted on. If the evidence be doubtful, the Court will either order an inquiry, or direct an issue to try the fact.

Looking at the evidence, I am of opinion that notice is proved against the Defendant *Parkes*. The state of the case is this:—*Copland* having incurred a considerable debt to *Parkes*, his solicitor, the latter asked for a security, whereupon *Copland* says, "I will give you a mortgage for what you like; but *White* and *Ford* have mortgages which will swamp the property." That appears to me to be clear and distinct notice to *Parkes* that there were mortgages already subsisting on the property; and independent of any question as to the Registry Acts, there was notice to *Parkes* of existing incumbrances on this property, and he must take subject to them.

That being so, the next question is, what effect have the Registry Acts on the transaction? Nobody regrets more than I do the effect of the decisions which have qualified the act. The legislature never intended that any notice should nullify it, the object being, that all incumbrancers should rank according to their priority on the

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the register. The Court, however, has held, that where a person who obtains a security has notice of a prior incumbrance, it is inequitable to allow him to obtain priority over the first incumbrancer by the mere priority of registration. The decisions establish this, and they must not be departed from, otherwise many titles would be destroyed.

The next question is, whether *Parkes*, by assigning his security for valuable consideration to other persons, who had no notice of the Plaintiff's security, could put them in a better situation than himself. This is not the case of a person having the legal estate, for the incumbrances both of the Plaintiff and *Parkes* are equitable, and persons taking an equitable security take it subject to all the equities which affect it.

These persons when they took the security believed they had a prior security or not. If they took an equitable mortgage independently of the registry act, they took subject to the prior mortgages on the property. If they relied on the register I apprehend that they must be taken to have notice of the whole register; and if so, they had notice that, two months after the date of *Parkes's* mortgage, a security was registered purporting to be dated four years previous. This would put them on inquiry whether *Parkes* had notice. In this case, where all persons except *White* take equitable interests, they must take subject to all equities, and in the position in which they stand: the decisions which hold that *Parkes* was bound by notice, would equally apply, though he attempted to get rid of the effect of it by disposing of the property and concealing the facts. If the first case was a fraud, it was equally a fraud in the second. I am of opinion, in the absence of any authority to the contrary, that an equitable incumbrancer on  
 property,

property, who has distinct notice of a prior incumbrance, cannot, by concealing his knowledge from a party claiming under him, make his security more extensive or give a better right to his assignee than that which he himself possesses. I give no opinion as to what would have been the effect if the parties claiming under *Parkes* had got in the legal state; but as the case now stands, I am of opinion, that these persons can only stand in the place of *Parkes*, and that if he committed a fraud by concealing the fact that he had notice of the Plaintiff's mortgage, they cannot avail themselves of their own want of notice.

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Mr. *Chandless*, for the assignees of *Copland* who had disclaimed, asked for their costs. He relied on the statement in the answer, that the assignees would have disclaimed, if applied to prior to the institution of the suit, and he argued, that as one of the assignees had been examined as a witness, under the 6 & 7 Vict. c. 85, no decree could be made against them, *Rowland v. Witherden* (a), and that the bill must therefore be dismissed with costs as against them.

*The MASTER of the ROLLS.*

The settled rule is, that if the assignees of a mortgagor do not disclaim prior to filing a bill, but only by their answer, no costs are given. Is the rule altered by the Plaintiff's examining him as a witness? In the case cited it was held, that no decree could be made against a Defendant who has been examined; but the Lord Chancellor did not decree that he was to have his costs. The bill must be dismissed as against the assignees without costs.

NOTE.—

(a) 3 Mac. & Gor. 568.



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NOTE.—See *Ford v. Lord Chesterfield*, *M. R.*, 26 Feb. 1853, *post*; *Gurney v. Jackson*, 22 *Law J. (Ch.)* 417; *Ohrly v. Jenkins*, 1 *De G. & Sm.* 543; *Buchanan v. Greenway*, 11 *Beav.* 58; *Gabriel v. Sturgis*, 5 *Hare*, 97; *Grigg v. Sturgis*, *Ib.* 93; *Gibson v. Nicol*, 9 *Beav.* 403; *Staffurith v. Polt*, 2 *De G. & S.* 571; *Silcock v. Roynon*, 2 *Y. & C. C. C.* 376; *Appleby v. Duke*, 1 *Phillips*, 272; *Clarke v. Wilmot*, *Ib.* 276; *Tipping v. Power*, 1 *Hare*, 405; *Higgins v. Frankis*, 20 *Law J. (Ch.)* 16; *Collins v. Shirley*, 1 *Russ. & Myl.* 638; *Perkin v. Stafford*, 10 *Sim.* 562.

May 29.

## WHITMORE v. MACKESON.

Distinction between misrepresentations giving a legal and those giving an equitable remedy.

The Court (assuming that the Plaintiffs had lent *A. B.* money, on the security, first, of a leasehold, secondly, of a policy, and thirdly, of the written representation of his solicitor as to his solvency), held, that the Plaintiffs could not make the solicitor liable for misrepresentation, without showing that they had taken proper steps to make the other securities available.

The Plaintiffs lent *A. B.* money on mortgage on the application of his solicitor, who assured them, in writing, that in his opinion he would be able to pay the amount. The Plaintiffs, alleging this to be a false and fraudulent misrepresentation, instituted a suit in equity to make the solicitor personally liable. Held, that their remedy, if any, was at law.

**M**R. *Mackeson*, a solicitor, on behalf of Mr. *Benjamin Smith*, proposed that the Plaintiffs, the *Reliance Assurance Society*, should make *Smith* an advance of 300*l.*, on the security of a leasehold house and a policy to be effected in their office on his life, with a surety for the premiums.

In the course of the negotiations, the Plaintiffs' solicitor, in a letter written to Mr. *Mackeson* said, "As the Society relies as much on the respectability as the responsibility of the borrower, I shall be glad to hear what you know of him" (Mr. *Smith*); and in another letter, he said, "Please to inform me of the name of the proposed surety for the payment of the premium, also whether you know Mr. *Smith* to be a respectable man and also responsible, and that the surety is good for the premiums."

In answer, Mr. *Mackeson*, on the 11th of *July*, 1850, wrote to the following effect:—"The surety" (*Watts*), "we are informed, is a man of property and highly respectable character, and to whom you can apply for a reference

reference if required. As to Mr. *Smith*, we have known him for three years, and always found him an honorable man who paid his way. His wife has some little property settled upon her. *In our opinion he will be able to pay the 300l. by instalments as proposed."*

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The 300*l.* was advanced, but *Smith* afterwards fell into difficulties and became unable to repay the amount borrowed. The rent fell into arrear and the taxes and insurance remained unpaid, whereupon *Smith*, stating that there was every reason to fear an action of ejectment for a breach of covenant, and that he was about to take the benefit of the act, proposed to the Plaintiffs to take the property and release him. This they declined, and instituted this suit against *Mackeson*, alleging that he had received part of the 300*l.* in discharge of a debt due from *Smith* to him:—that he knew the embarrassed and insolvent circumstances and condition of *Smith* at the time:—that he had misrepresented his circumstances and wilfully concealed and neglected to disclose the real facts for his own purposes. They alleged that they had relied on his representations, and had advanced their money on the faith of his having made true and *bonâ fide* representations.

The bill prayed a declaration, that *Mackeson* was liable, in default of *Smith* and *Watts*, for the payment of the 300*l.* and premiums, and for a sale of the leaseholds, and that *Mackeson* might be decreed to pay the deficiency.

Pending the suit, the lessor re-entered for breaches of the covenants and put an end to the term.

Mr. *Roupell*, Mr. *Willcock* and Mr. *Jessell*, for the  
Plaintiffs,

1852. Plaintiffs, relied on *Pasley v. Freeman* (a), and the notes to that case in 2 *Smith's Leading Cases* (b), and *Montefiori v. Montefiori* (c).  
  
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Mr. *R. Palmer* and Mr. *Giffard*, *contrà*, were not heard.

May 30.      *The MASTER of the ROLLS.*

The Plaintiffs are not entitled to a decree in this case.

The rule of this Court is, that equity will compel a person who misrepresents a fact or gives an undertaking, to make it good ; but it will not do so in such a manner as to interfere with the regular and proper province of a Court of Law. Several cases were referred to by me in the late case of *Money v. Jorden* (d), where I held, that, where one person states a fact to be true on the faith of which another acts, this Court will compel him to make his assertion good ; but I am not aware of any case, in which this Court has held, that where a person has given a general character respecting another you can come into equity to compel him to make good the representation made by him. Though a person who misrepresents the character or the credit of another may be liable for the damage occasioned by such misrepresentation, yet the amount can only be determined in a Court of Law by an action for damages, and not in this Court ; although cases may arise, in which it may be difficult to draw the line and determine whether an action at law or a suit in equity would be the proper remedy.

These

(a) 3 *Term R.* 51.

(b) 2nd ed. 55.

(c) 1 *Sir W. Blackstone*, 363.

(d) 15 *Beav.* 372, and 2 *De G. M. & M.* 318.

These observations are applicable to this particular case. The Plaintiffs, the *Alliance Assurance Company*, advanced the sum of 300*l.* to a Mr. *Smith*, upon what I will call three securities; first, a leasehold house in *Bedford Row*; secondly, an assurance on his life, with a surety for the payment of the premiums; and, thirdly, a letter written by Mr. *Mackeson* to the Assurance Company respecting Mr. *Smith's* credit. I assume that the Insurance Company would not have advanced the money on the two former securities without the letter: but even in this view of the case, it is impossible to put this letter higher than this, that Mr. *Mackeson* undertook to pay everything which the security should not realize. I think it does not amount to that, but assuming it did, I am then of opinion that it would be the duty of the Plaintiffs, who seek to make Mr. *Mackeson* personally liable, to show that they had done all in their power to make their security available. It is impossible to say, that this security was of no value at all, because not only was it treated otherwise in the first instance, but it has not been proved, nor has it been alleged at the Bar, that there was any inaccuracy in the representations as to its value. Besides this, the value of the house was a matter respecting which the Plaintiffs could exercise their own judgment. They might have sent a person to ascertain its value and whether it was a fit property to lend their money upon, but they did not think proper to do so. It having been impossible for Mr. *Mackeson* to take possession of the property, can the Plaintiffs fix him, without showing either that some attempt was made by them to obtain possession of the property from Mr. *Smith* or to make the tenant attorn to them. They cannot say that it was not their duty to make the property available, if that were possible, and it is for them to show it was not. A sale might have realized the full amount of what was

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due to them ; and the profit rent appears to have been 53*l.* 16*s.* after payment of the rent, taxes and insurance, and this, in six years, would have paid the whole amount due to the Plaintiffs.

I come to consider the second security, namely, the policy, the profits to be derived from which was one of the inducements to the insurance office to make the advance. What has become of this, and how is Mr. *Mackeson* liable in respect of any default in respect of it? I find no statement whatever on the part of Mr. *Mackeson*, that Mr. *Watts* was, within his knowledge, a person of sufficient substance to be security for the payment of the premiums. The statement is, "we are informed, that *Watts* is a man of property and highly respectable character, and to whom you can apply for a reference if required." It is obvious, that Mr. *Mackeson* did not, by this, pledge himself to the respectability of Mr. *Watts*; on the contrary he referred the *Alliance* Company to *Watts* himself for a reference, in order to ascertain whether any reliance could be placed upon him for payment of the premiums. If they had applied and had found that he was not a fit person to secure the payment of the premiums, they might have refused to advance the money until they had obtained some other sufficiently responsible person. Mr. *Mackeson*, therefore, is in no degree liable, in respect of the house or of Mr. *Watts*, and both those securities have failed, by what I can only consider to be the default of the Plaintiffs themselves. What they might have realized I do not know ; and I am of opinion, that parties who have not made those two securities as available as they might have done, cannot call on Mr. *Mackeson* to make good the deficiency, after realizing as much as those securities could now realize. This alone would be sufficient to dispose of this part of the case ; and, so far

far as the bill prays a sale, I find that the deed contains a power of sale, so that the Plaintiffs do not require the assistance of the Court in that respect, and it is now admitted on both sides that the property itself is gone.

1852.

WHITMORE  
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MACKESON.

I return again to the letter and to the consideration whether it gives to the Plaintiffs any right in equity. The letter states as follows:—"As to Mr. *Smith*, we have known him for three years, and have always found him an honorable man who paid his way. His wife has some little property settled upon her. In our opinion, he will be able to pay the 300*l.* by instalments as proposed."

No expression will fall from me to defend the statements contained in that letter. They do not appear to have been in strict accordance with some of the facts known to *Mackeson*; but with respect to that I express no opinion, because I am clear, that I can found no decree whatever upon it in the present case. If, in respect of that letter, Mr. *Mackeson* is liable to the Plaintiffs, and they can prove that they were misled by it and advanced their money upon the security of it, the proper course for them to take is, to seek their remedy by an action in a Court of Law and not by suit in a Court of Equity. If I made a decree I should be giving the Plaintiffs damages for a general statement as to character. I am therefore of opinion, that on no part of this case can I give relief, and the bill must therefore be dismissed with costs.

1851.



Dec. 19.

## SOUTHOUSE v. BATE.

Bequest to a woman of the dividends of a sum of stock for her separate use, with a direction that at her death she might leave it to her children, or whom she might choose.

Held an absolute gift, and that she was entitled to payment.

THE testator bequeathed to his servant, *Betty Wright*, the half-yearly interest of 1,000*l.* stock, 3 per cents, "to be paid to her by his executors, notwithstanding she might have any future coverture;" and he directed that her receipts should be a sufficient discharge to his executors, and "at her death that she might leave it to her children or whom she might choose."

*Betty Wright* married *Francis Galand*, and by an order made in the suit in 1815, the 1,000*l.* was transferred to "*Betty Galand's* annuity account," and the dividends were ordered to be paid to her for life or until further order, with liberty to apply.

*Betty Galand's* husband having died in 1852, she presented this petition, for the transfer to her of the 1,000*l.*, on the ground that she took an absolute interest therein.

Mr. *Walpole*, in support of the petition.—The unrestricted gift of interest or dividends is an absolute gift of the capital: *Elton v. Shephard* (a); *Haig v. Swiney* (b). *Betty Wright* therefore took an absolute interest in the 1,000*l.* for her separate use, with a super-added power of bequeathing it to any body she pleased.

The testator intended to enlarge and not to abridge the

(a) 1 Bro. C. C. 532.

(b) 1 Sim. &amp; St. 487.

the absolute interest; and if the subsequent power be inconsistent with actual unrestricted ownership, it is void: *Robinson v. Dugate* (a); *Maskelyne v. Maskelyne* (b); *Bradley v. Peixoto* (c); *Bull v. Kingston* (d); *Ross v. Ross* (e); *Comber v. Graham* (f); *Green v. Harvey* (g); *Simmons v. Simmons* (h); *Borton v. Borton* (i).

1851.  
SOUTHHOUSE  
v.  
BATE.

Mr. Lewis, for the representatives of the testator.

*The MASTER of the ROLLS.*

Before I decide this case I will look at the will and the authorities. All the cases show that this, according to the ordinary rules of construction of a will, is either an absolute interest with a superadded proviso, which would be void, or an estate for life, with a power to dispose of the property by will.

*The MASTER of the ROLLS.*

I have considered this case, and think the argument on behalf of the petitioner is correct. This must be taken to be an absolute gift of the stock to *Betty Wright*, with a superadded power to dispose of it by her will, but which does not derogate or detract from the prior absolute gift. The petitioner is therefore entitled to an order according to the prayer of the petition.

1852.  
Jan. 13.

- (a) 2 Vern. 181.
- (b) 2 Ambler, 750.
- (c) 3 Ves. 324.
- (d) 1 Mer. 314.
- (e) 1 Jac. & W. 154.

- (f) 1 Russ. & Myl. 450.
- (g) 1 Hare, 428.
- (h) 8 Sim. 22.
- (i) 16 Sim. 552.



1852.

June 1.

LADY BERESFORD *v.* DRIVER.

A decree made with costs against a land agent and receiver after his discharge, for the delivery up of all documents relating to the estate and its management.

THIS case, reported *ante* (a), came on for hearing.

Mr. *Lloyd*, and Mr. *Shapter*, for the Plaintiff.

Mr. *Roupell* and Mr. *Hallett*, for the Defendants.

The MASTER of the ROLLS held the Plaintiff was entitled to relief, and ordered the Defendants to deliver up the documents relating to the estate and its management, and to pay the costs of suit.

(a) 14 *Beav.* 387.

June 4.

COTTON *v.* CLARK.

A bankrupt executor was charged with interest on his balances, but he was allowed his costs of suit. Held, that the costs subsequent to the bankruptcy were not to be set off against his debt, which had accrued prior to his bankruptcy.

THIS was a suit against *Francis Clark*, the sole surviving executor, for the administration of the estate, and to charge him with interest on balances of between 700*l.* and 800*l.*, which had remained uninvested previous to his bankruptcy. The first question was, whether the Defendant was chargeable with interest; the second, whether he was to have his costs of suit; and the third, whether they ought to be set off against the sums due from him.

Mr. *R. Palmer* and Mr. *Elderton*, for the Plaintiff.

Mr. *Glasse* and Mr. *Hoare*, for the Defendant, cited *Samuel v. Jones* (b).

*The*

(b) 2 *Hare*, 246.

*The MASTER of the ROLLS.*

1852.

COTTON  
v.  
CLARK.

I think the Defendant is entitled to his costs, and that he ought to be charged with interest on his balances at four per cent. for the two and a half years during which he retained them in his hands. The case of *Samuel v. Jones* expressly decides, that the Court will not set off the costs incurred by an executor subsequent to his bankruptcy against his debt which accrued previous to the bankruptcy.

I cannot distinguish these two cases. I am of opinion that the claim substantiated in this suit was a debt previous to his bankruptcy; and though it could not be proved, still a claim might have been made, and a portion of the assets set aside to answer it.

Liberty may now be given to the Plaintiff to go in and prove the amount in the bankruptcy.

SPARROW v. JOSSELYN.

June 4.

THE testator, Mr. Sparrow, was a partner in two banking establishments, the one at *Chelmsford* and the other at *Braintree*, his capital in each being, by arrangement with his copartners, 5,000*l.*

Bequest of 10,000*l.* sterling, "being my share of the capital now engaged in the banking business," &c. Held to be a demonstrative and not a specific legacy.

By his will, he devised his real and personal estate to his trustees, upon trust, if necessary, to sell his real estate, and pay his debts and legacies.

By a codicil to his will he expressed himself as follows:—

"I hereby revoke the several legacies or portions of 3,000*l.*

1852.  
  
 SPARROW  
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3,000*l.* in and by my said will given to my sons *Basil Sparrow* and *John B. Sparrow*, and in lieu thereof, *I give and bequeath unto my son Basil Sparrow* (the Plaintiff) 10,000*l. sterling, being my share of the capital now engaged in the banking business of Messrs. Sparrow, Walford, Notledge and Greenwood, as carried on at Chelmsford and Braintree, both in the county of Essex ;* and I direct that the same sum of 10,000*l.* be continued in the said banking business, until my said son *Basil Sparrow* shall refuse or determine to decline to take any share in the said business. And I direct that the interest and annual produce to arise from the said 10,000*l.* shall be paid to my executors or executor, for the time being, until my said son *Basil Sparrow* shall attain the age of 21 years, and that they or he shall apply so much of such interest and annual produce for his maintenance until 21, and accumulate the surplus."

And after reciting his right so to do, nominated his son *Basil Sparrow* to succeed him in the business of banker at *Chelmsford* and *Braintree*, and proceeded thus :—" I direct that the legacy of 10,000*l.*, my *present* capital therein, hereinbefore given to him, shall be paid to him, my said son *Basil Sparrow*, whether the same, at my decease, be engaged in one or two or more separate sums, *it being my intention to give him such capital of 10,000*l.*, wherever the same may be.*"

At the testator's death, he had his capital of 5,000*l.* in one of the banks, and a sum of 1,700*l.* standing to his separate banking account; but on taking the accounts of the other bank, it was discovered, that a clerk had defrauded the bankers to a very considerable extent, and the 5,000*l.* capital was very considerably reduced, and on the whole, his capital in both banks (exclusive  
of

of the 1,700*l.*) was deficient by 2,766*l.* to produce 10,000*l.* sterling.

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Under these circumstances *Basil Sparrow*, by this suit, insisted that he was entitled to a legacy of 10,000*l.* sterling, and he sought to have the above deficiency raised and paid out of the testator's estate.

The question was whether the legacy was specific or demonstrative.

Mr. *R. Palmer* and Mr. *Bigg*, for the Plaintiff.—This is a pecuniary and not a specific legacy. The gift is of 10,000*l.* sterling, a description appropriate to a pecuniary legacy, but inapplicable to a sum resulting from a partnership account. A fund was pointed to, out of which the legacy might be paid; but the failure of that fund will not defeat a legacy payable at all events. If the testator had retired from the concern and had withdrawn his capital, the legatee would still have been entitled to his legacy: 1 *Roper* on Legacies (a); *Le Grice v. Finch* (b); *Williams* on Executors (c); they also cited *Colvile v. Middleton* (d).

Mr. *Lloyd* and Mr. *Osborne* contra, for the executors and trustees argued, that this was not a general legacy, but one wholly payable out of a particular fund, which having partially failed, the legatee must bear the loss.

They cited the *Attorney-General v. Pyle* (e), and *Door v. Geary* (f).

Mr. *R. Palmer*, in reply, relied on the word "present," and

(a) Page 235 (4th ed.)

(b) 3 *Mer.* 50.

(c) 236, 4th ed.; 740, 1st ed.

(d) 3 *Beav.* 570.

(e) 1 *Atk.* 435.

(f) 1 *Ves. sen.* 255.

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and argued, that the expression "being my share" was equivalent to "which is my share," which was merely demonstrative.

*The MASTER of the ROLLS.*

There is considerable difficulty in determining the effect of the words of this will, an event having happened which the testator never foresaw at the time of making it. The Court has to construe the words under circumstances, which I believe he never anticipated would arise.

I am of opinion that the testator intended to give a sum of 10,000*l.* sterling out of whatever might be his capital in the concern at the time of his decease, and that his intention was not to give his capital more or less, but 10,000*l.* out of it. At the time he made his will, he had no doubt that 10,000*l.* was the amount of his capital in the concern; this might have varied, but he intended to give 10,000*l.* and no more. The early part of the will leads strongly to this conclusion. First he gives "10,000*l.* sterling." He then proceeds to deal with this as if it were a sum of 10,000*l.* in money. He directs "the same sum of 10,000*l.*" to be continued in the business, and the interest to arise "from the said 10,000*l.*" to be paid for his son's maintenance, and the surplus to accumulate. All these provisions point exclusively to a dealing with a distinct and capital sum of 10,000*l.* He subsequently directs the "legacy of 10,000*l.*, his present capital," to be paid to his son, "whether the same at his decease be engaged in one or two or more separate sums."

If the legacy be specific, and the testator or his part-  
 ners

ners had put an end to the concern, his capital would have been paid out to him ; but I am of opinion that if it could be clearly traced it might be followed and recovered by the legatee. This is inconsistent with its being a specific legacy. Again, he has used the words "now" and "present" capital, to prevent the legatee taking any accretion thereto, guarding on the one side against the legatee taking more than 10,000*l.*, and on the other, against the whole concern being put an end to.

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The result is, that the proper construction to be put on this will is, that this was a demonstrative legacy of 10,000*l.*, and that the Plaintiff is entitled to have it made good to him.

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BATES *v.* HILLCOAT.

JAN 4.

**T**HIS was a bill by a party entitled by virtue of an equitable deposit and judgment against the other incumbrancers. Judgment creditors are not allowed successive periods of three months for redemption.


Mr. *R. Palmer* and Mr. *C. C. Barber*, for the Plaintiff.

Mr. *Gordon*, Mr. *J. Sidney Smith*, Mr. *Humphry*, and Mr. *Hetherington*, for different parties.

The MASTER of the ROLLS said :—In another branch of the Court it has been held (*a*), that where there are several judgment creditors they ought to be allowed but one period for redemption. I shall follow that practice, for otherwise the process of successive foreclosure of judgment creditors would be interminable.

There

(*a*) *Stead v. Banks*, 5 De G. & Sm. 560. "

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There will be successive rights of redemption, but not with the ordinary intervals of three months, as in the common form of mortgage decrees.

June 10.

HARTWELL v. COLVIN.

As to the right of a creditor to come in under a decree, at any time before the fund has been distributed.

After a long delay, the Court requires more than the ordinary proof of a debt in the Masters' Office.

In 1817, a trust deed was executed by A. B. for the benefit of his creditors. The deed was established by the decree in 1842, and an account of

IN 1817, some native merchants of *Calcutta* named *Sarkies* assigned their property to trustees, in trust to collect and apply the monies in satisfaction of the several debts owing by them, "to such of their respective creditors as had executed or should execute" that indenture, rateably. The debts were, if required by the trustees, to be verified by the affidavit of the creditors, respectively; and it was provided, that if any creditor should, for one year after notice, neglect to execute the deed, he should be excluded.

In *January*, 1839, this suit was instituted, for the purpose of having the trusts of the deed executed; and by the decree made in 1842, it was ordered, that the trusts of the deed should be carried into execution here, and the Master was to advertize for creditors to come in and prove their debts.

In


debts was directed. The petitioner, in 1846, came in under the decree, and claimed in respect of promissory notes dated in 1816, given by A. B. to his father, who died in 1828. He produced the notes and proved the signatures, but gave no proof of the consideration, or of any thing being then due. Held, that his claim had been properly rejected by the Master, for after the great lapse of time the notes could not be admitted upon the ordinary proof.

DATES.

1816. Promissory notes.  
 1817. Trust deed.  
 1828. Death of *Mullick*.

1839. Bill filed.  
 1842. Decree.  
 1846. Claim of Petitioner.

In 1846, the petitioner, *Oboychurn Mullick*, carried into the Master's office a claim for a sum of money, as creditor of *Sarkies*, under the following circumstances:—He produced three promissory notes of *Sarkies*, dated in 1816, payable to *Gourchurn Mullick* or order, and which became due in the same year, and he verified the signatures. *Gourchurn Mullick* died in 1828, and the petitioner, his son, obtained letters of administration to him in 1850.

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 v.  
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The Master disallowed the claim, on the ground of there being no evidence of anything having been due on the notes, and no evidence of the consideration for them.

The funds still remaining in Court, the petitioner presented a petition, by way of appeal, praying payment rateably with the other creditors. He now made an affidavit, showing that he was ten years of age at the date of the notes, and stating his belief that they had not been paid to his father, and positively stating that they had not been paid to him, and that he was unable to ascertain the consideration given for the notes.

Mr. *Lloyd* and Mr. *Bird*, in support of the petition. The promissory notes are sufficiently proved, both according to the practice at law, *Jacob v. Hungate* (a); *Lacey v. Forrester* (b); *Stoughton v. Earl of Kilmorey* (c); *Percival v. Frampton* (d); *Mills v. Barber* (e); and the usual practice in equity, *Whitaker v. Wright* (f); *Rundell v. Lord Rivers* (g). As to the consideration given for the notes, it is stated, on the face of them, that they

were

(a) 1 *Mood. & R.* 445.  
 (b) 2 *Cr. Mee. & R.* 59.  
 (c) *Ib.* 72.  
 (d) *Ib.* 180.

(e) 1 *Mee. & W.* 425.  
 (f) 2 *Hare*, 310.  
 (g) 1 *Phillips*, 88.



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were given "for value received." This is an admission binding on the maker of the note and on the trustees who claim under him, besides which the notes *primâ facie* import a consideration; *Byles on Bills(a)*.

The petitioner is within the terms of the deed, which was made in favour of every creditor who, after application, should not neglect or refuse to accede to it, they may come in so long as the funds remain undistributed, *Gillespie v. Alexander(b)*; *March v. Russell(c)*; and he has done so by his claim.

As to the lapse of time, the petitioner could not, by the terms of the deed, sue his debtor, and there was no necessity for so doing; for "it is not to be inferred that a man has no debt because he does not go to law to enforce payment when he has a trustee to pay him." *Hughes v. Wynne(d)*. Again, the decree operates as a judgment for the benefit of all the creditors, and neither the trust nor the judgment is barred or satisfied(e).

Mr. Roupell, Mr. R. Palmer and Mr. Glasse, were not heard.

#### *The MASTER of the ROLLS.*

I am of opinion that the petitioner is not entitled to any order upon this petition; and I proceed upon the ground of the lapse of time that has occurred since the debt accrued due. It is necessary to distinguish between the lapse of time, with reference to the state of the cause when the petitioner came in to prove his debt,

(a) Page 88, 4th ed.

(b) 3 *Russ.* 130.

(c) 3 *Myl. & Cr.* 41.

(d) *Turn. & R.* 309.

(e) See *Ex parte Shaw*, 1 *Mod.* 598.

**debt**, and the time when the debt or supposed debt was **contracted**.

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With respect to the first, the case of *Gillespie v. Alexander*, and many others, and the daily practice of the Court, show that, subject to certain regulations which the Court makes respecting costs, the petitioner, assuming his debt to be established, may come in at any time before the fund has been administered, and make them available to payment of his own as well as the other debts. I am therefore of opinion that this petitioner is in ample time, so far as the state of the cause is concerned. But the reason why I think he is not entitled to come in is this:—This debt, assuming its validity, became due on the 30th *September*, 1816; the bill was filed in *January*, 1839, that is, upwards of twenty-two years after the debt had accrued due. Now, under ordinary circumstances, the Court would require some strong facts, and some sufficient explanation, to show why a creditor had done nothing for twenty-two years to enforce his debt. In *Duffield v. Creed* (a), where an action was brought on a note twenty years old, "Lord *Ellenborough* said, that if this had been a bond, twenty years would have raised a presumption of payment, in which case he would have left the presumption of payment to the jury; and he thought, as this note was unaccounted for, the same rule of presumption of payment ought to apply."

In this case, no explanation whatever has been given to me to show why *Gourchurn Mullick*, in the first instance, or the petitioner, his son, in the second instance, took no step to enforce this debt. *Gourchurn Mullick* died in 1828, nearly twelve years after the debt had

(a) 5 *Exp.* 52.

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had accrued due. The petitioner, being twenty-two at his death, took no step, for upwards of ten years afterwards, to enforce the debt. Now he either assented to the deed, or he did not; but in neither case is there any excuse for his neglecting to take any steps or proceedings to enforce the debt. If he did not assent to the deed he might have sued his debtors. If he did assent to it, he might have enforced the trusts of the deed for the benefit of himself and the other creditors, but he takes no step whatever. The question is, whether after this lapse of time, and without any explanation, he is entitled to come in and give the same sort of ordinary *primâ facie* proof, as if these notes had been only a few months old. I concur in the proposition laid down, or the course of practice asserted in *Whittaker v. Wright* and *Rundell v. Lord Rivers*, in which it was ascertained, that the Master and the Court, in all cases of suspicion, require more than the ordinary and formal proof. Various circumstances may cause the suspicion and require extra evidence to be given, and one is the great length of time which has elapsed without any claim being made or any explanation given for the delay.

The reason why the Court acts with great strictness arises from the loss of evidence which necessarily takes place in the lapse of time, and because it becomes impossible to prevent the Court doing injustice, if it act on an old transaction exactly as it would have done if the case had been perfectly recent. It is on that principle that Statutes of Limitations are founded; and why Courts of Equity, acting in analogy to the Statutes of Limitations, will refuse to set aside a deed (*a*), even where the evidence before the Court shows that it was obtained by fraud, if the person

(a) *Champion v. Rigby*, 1 R. & M. 539.

person who suffers by it, being aware of all the facts, has not prosecuted his remedy for the purpose of setting it aside within a reasonable time. In this case if the evidence has been lost it has been the fault of the petitioner or of the person through whom he claims, and the fact that he is unable to give any evidence of consideration, that his books show no evidence, and that there is nothing but these three notes produced, which are now upwards of thirty-six years old, are, in my opinion, sufficient to justify the Master and the Court in saying, that it cannot treat this case as an ordinary simple case, and admit them to proof in the same manner as if they were recent.

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The consequence is, that the Court requires strict proof of them; and no such evidence being given, I am of opinion, that it would be a violation of a wholesome rule, if the Court were, on this simple affidavit, which it is obvious could not be met by the Respondents, to allow this debt to be proved. I am of opinion, therefore, that I must dismiss this petition with costs.

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NOTE.—Affirmed by the Lords Justices, July 6, 1852.

1852.



June 11.

*In Re FIELD'S Trust.*

Trust monies  
being paid  
into Court  
under the  
Trustee Re-  
lief Act, Held  
that the costs  
of an applica-  
tion for pay-  
ment of the  
income to the  
tenant for life  
ought to be  
paid out of the  
*corpus*.

IN this case, a fund had been paid into Court under the Trustee Relief Act (10 & 11 *Vict.*) (a), and a petition was now presented by *Lydia Field*, the tenant for life, for an order for payment to her of the income.

The question was, whether the costs of this petition ought to be paid out of the *corpus*, or out of the income of the fund.

Mr. C. P. *Phillips*, in support of the petition, cited *Re Ross* (b).

Mr. W. W. *Cooper*, for the remainderman, argued, that the costs of a proceeding for the sole benefit of the tenant for life, ought to be paid out of her share in the fund.

The MASTER of the ROLLS considered the case cited in point, and ordered payment out of the capital (c).

(a) Cap. 96.

*re Lorimer, Ibid.* 521.

(b) 15 *Jur.* 241, and see *In re Cawthorne*, 12 *Beav.* 56; *In*

(c) *Reg. Lib.* 1851, A. fol. 993.

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## HEATON v. DEARDEN.

July 1.

**T**HOMAS FERRAND and *James Dearden* were tenants in common in fee of some freehold property at *Tooter's Hill, Lancashire*.

One of two tenants in common of an estate agreed to grant a lease of the mines under it. Held, that the lessee was entitled to a decree for specific performance and for a partition of the estate.

On the 15th of *May*, 1844, *Thomas Ferrand* alone, in consideration of 330*l.*, agreed to demise for twenty-one years, to four persons named *Watson* and *Smith*, "all and every the mines, veins, and beds of coal and cannel," under the lands of him *Thomas Ferrand* at *Tooter's Hill*, with liberty to get the minerals, sink shafts, erect machines and buildings, make bricks, and use the roads, at a rent of 270*l.* per acre for the lower mines and 60*l.* for the upper. The lessees agreed to work one acre, at least, per annum, and the lessor agreed to indemnify the intended lessees against all litigation and disturbance on the part of *James Dearden*, and all other persons.

In 1845 *Thomas Ferrand* died, and his interest in the estate descended on his nephew *James Dearden*, his heir at law, who thereupon became entitled to the whole estate.

In *August*, 1847, the Plaintiff *Heaton*, claiming as assignee of the benefit of the agreement, instituted the present suit, in conjunction with the two *Watsons*, against *James Dearden* and others, praying a specific performance of the agreement for a lease, and that a partition of the property might be made, so as to allot, in severalty, a part in lieu of the undivided moiety of

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*Thomas Ferrand*, and upon a partition being made, that a proper lease might be executed by *James Dearden*, of the part allotted in respect of *Thomas Ferrand's* moiety.

Mr. *R. Palmer* and Mr. *J. V. Prior*, for the Plaintiffs, cited *Baring v. Nash (a)*.

Mr. *Roupell* and Mr. *Hetherington*, for *Dearden*, argued, that this contract, by one of two owners, to demise unbroken minerals, was invalid; secondly, that by the decree asked, the lessee would obtain an interest different from that contracted for, for the agreement was for a lease of the moiety of all the undivided minerals, whereas the decree would give him the sole right to a divided moiety of them; thirdly, that the bill was multifarious.

Mr. *Teed*, for a trustee.

Mr. *Wright* and Mr. *L. Field*, for other parties.

*The MASTER of the ROLLS.*

It is undoubtedly true, that the Court considers cases of specific performance in the light of an appeal to its discretion, and in cases of peculiar difficulty it sometimes leaves the parties to their primary remedy by action at law. But this discretion must be exercised having regard to this principle, that a party to a contract has a right to have it specifically performed, unless some peculiar circumstances arise, which make it inequitable to enforce its performance. Upon this part of the case, the question, therefore, is, whether any such circumstances exist here, as to make it proper for the Court, in the exercise

(a) 1 *Ves. & B.* 551.

exercise of its discretion, to withhold a decree for specific performance? and I am not, notwithstanding the able argument I have heard, convinced that it ought to refuse such a decree.

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The state of the case is this:—One of two tenants in common in fee simple of an estate enters into a contract to demise the minerals thereunder to persons represented by the plaintiffs. I have to consider how the case differs, if at all, from a contract by a tenant in common to sell his interest in the estate? It only differs in degree.

On behalf of the principal Defendant the case is put in this way:—This is a contract by a tenant in common to demise an undivided moiety, and it would be varying the terms of the contract, and be giving him more than he agreed for, if a lease were granted to him of an ascertained moiety. Now the Court must, in this case, consider two things, which, from the peculiar nature of this case, are mixed up together: first, whether the contract ought to be specifically enforced; and, secondly, what are the rights which spring out of the due performance and completion of that contract?

For this purpose, I will consider the case as if *Thomas Ferrand* were alive, and the sole Defendant to a suit for specific performance. The Court would then have to consider, whether this contract, entered into by one of two tenants in common, to demise the mines that lie under his undivided portion of the estate, ought to be specifically enforced? I cannot doubt that, in that simple case, the Court would have specifically enforced the contract. Both parties were perfectly aware of the nature of the contract, and though it might happen (which is a question I will consider presently), that such a lease would give nothing to the lessee, still, if he chooses



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chooses to have a specific performance, the lessor cannot resist performing his contract, on the ground that it will give the lessee nothing. I entertain no doubt that, in such a case, the contract would have been specifically enforced, and that the Court would have ordered the Defendant to grant a lease of all the minerals under the land, so far as he was interested in it; and which, even if this contract had contained nothing specific on the subject, would have included, by necessary inference, a right to get at those minerals.

If a decree had been made, and the demise had been duly executed, it would then have been impossible for the lessee to make it available, unless by another suit against the other tenant in common of the estate for partition. *Baring v. Nash* (a) is a distinct authority, that the Court will allow a partition in such a case. In *Baring v. Nash*, a person who had a long term of years in an undivided tenth part, filed a bill for partition against the owner of the entirety of the other nine-tenth parts not making the reversioner of his own term a party. Two questions were raised, first, whether he could proceed in the absence of the reversioner of his own tenth part, and next, whether he could, in respect of his limited interest in one tenth part, maintain a suit for partition against the other owners. The Court held that he could, and that although he had but a limited interest, he was entitled to have it made available for his benefit. I cannot, therefore, doubt, that if *Ferrand* had been living, there would have been, in the first place, a decree against him for the specific performance of the contract; and that when a demise had been made, the lessee might have filed a bill and have obtained a partition of the estate.

It

(a) 1 Ves. & B. 551.

It is manifest that this right is in no degree affected by the death of *Ferrand*, but the peculiarity of this case is this:—it so happens that the heir-at-law of *Ferrand* is also the owner of the other moiety of the estate, and a question has been raised, whether you are not, in fact, doing by one suit that which ought properly to be done by two, and which would necessarily have been done by two suits if the Defendant had not united in himself these two characters. I am of opinion that this Court, in order to avoid circuity of remedies, and having before it all parties interested in both moieties, and the prayer of the bill being distinct for that purpose, will, in the first place, specifically enforce the contract against the Defendant, as heir-at-law of *Ferrand*, and when that has been done, will make a decree against him for a partition, in his character of owner of the other moiety of the estate. It would be unfit and contrary to the principles of equity to compel the Defendant to institute another suit and take other and fresh proceedings for that purpose.

I am of opinion, therefore, that the Plaintiffs, assuming that there is no other difficulty, are entitled to have a decree for specific performance against *James Dearden*, as heir-at-law of *Ferrand*, and for that purpose, as the title is accepted, there must be a reference to the Master, in case the parties differ, to settle the terms of the demise; and when that has been done, there must be a decree for a partition (unless it can be settled by the agreement between the parties) to set out, by metes and bounds, what portion of the property is included in this demise, and in respect of which the Plaintiffs will be entitled to work the minerals of the estate.

It was argued, that the minerals being unbroken, and there being no agreement to demise the surface of the ground,

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ground, you could neither have the specific performance nor a partition of the property. But so far as the partition is concerned, the point is decided by the case of *Baring v. Nash*, because a limited interest in a portion of the estate would not differ in effect from a limited interest with respect to the whole of the estate. With respect to specific performance, I am also of opinion that it is decided by the ordinary principles, that a man may, if he pleases, sell his interest in the surface of an estate reserving the minerals, or he may sell his interest in the minerals reserving the surface,—that he may demise and contract to demise the minerals alone, in the same manner as he may enter into a contract to sell them without the surface,—and that having demised the minerals, he has also given the right to get at them.

I feel some difficulty with respect to the exact form of the decree. With respect to the form of the demise I shall say nothing at present, that being a matter to be settled by the Master in case the parties differ. I propose to make a decree for a partition, on a lease being executed containing such covenants as the Defendant *Dearden* is entitled to insist on.

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WILSON v. EDEN.

July 9, 13.

THE case is reported in 11 *Beavan* (a), where the facts are fully stated. Lord *Langdale* held, that, under the 1 *Vict. c. 26, s. 26*, the leaseholds passed by the residuary gift with the personalty, but he subsequently sent the case for the opinion of the Court of Exchequer. That Court entertained a different opinion. The cause came on before Sir *John Romilly, M. R.*, when he ordered a case for the opinion of the Court of Queen's Bench, which Court concurred in opinion with the Court of Exchequer (b). The case again came before this Court, and the point was again reargued.

The case of *Wilson v. Eden* (11 *Beav.* 237) reversed.

A testator having devised the residue of his personal estate, whatsoever and wheresoever, to *A. B.*, devised all his manors, lands, &c., at *W.*, in the county of *Durham*, and at *B.*, in the county of *York*, and a parcel of land purchased of *M. L.*, and all other his real estates in the counties of *Durham* and *York* and elsewhere, and all his estate and interest therein to *C. and D.* and their heirs, to certain uses. Held, under the 1 *Vict. c. 26, s. 26*, that his leaseholds in *Durham* passed to *C. and D.* with the real, and not to *A. B.*, with the personal, estate.

Mr. *Elmsley* and Mr. *Giffard*, for the Plaintiff.


Mr. *Roupell*, Mr. *Welford*, Mr. *Faber*, Mr. *Goldsmid*, Mr. *Dickenson*, Mr. *Lloyd* and Mr. *R. Palmer*, for other parties.

The following cases were cited:—*Arkell v. Fletcher* (c); *Lane v. Earl of Stanhope* (d); *Goodman v. Edwards* (e); *Weigall v. Brome* (f); *Lowther v. Cavendish* (g); *Hobson v. Blackburn* (h); *Hall v. Fisher* (i); *Thompson v. Lady Lawley* (k); *Day v. Trig* (l); *Bootle v. Blundell* (m);

- (a) Page 237.
- (b) See 5 *Exch. Rep.* 752;
- 21 *L. J. (Q. B.)* 385.
- (c) 10 *Sim.* 299.
- (d) 6 *T. Rep.* 345.
- (e) 2 *Myl. & K.* 759.
- (f) 6 *Sim.* 99.

- (g) 1 *Eden*, 99.
- (h) 1 *Myl. & K.* 571.
- (i) 1 *Coll.* 47.
- (k) 2 *Bos. & P.* 303.
- (l) 1 *P. Wms.* 286.
- (m) 19 *Ves.* 494.

*Doe*

1852. *Doe d. Dunning v. Cranstoun* (a); *Watkins v. Lea* (b);  
 *Parker v. Marchant* (c); *Hartley v. Hurle* (d); *Whit-*  
 WILSON *aker v. Ambler* (e); *Moor v. Raisbeck* (f); *Farrar v.*  
 v. *The Earl of Winterton* (g); *Cole v. Scott* (h); *Emuss v.*  
 EDEN. *Smith* (i).

Mr. *Malins* and Mr. *Dumergue*, *contrà*, were not heard.

July 13. *The MASTER of the ROLLS.*

I should, with very great hesitation indeed, dissent from the unanimous opinion of two Courts of Law upon a question as to the construction of the clauses in a statute applicable to this subject, even if I myself dissented from that opinion; but after having attentively heard the argument of counsel, endeavouring to persuade me that the Courts of Law have come to a wrong conclusion, I really must say that I have become more confirmed in its propriety. I express no opinion whatever as to what would have been the effect of this will on the leaseholds, if unaffected by the last Statute of Wills. But in my opinion, the 26th section concludes the question, and makes the leaseholds pass under the devise.

The first thing to be considered is, what is the operation of this clause of the act. Mr. *Elmsley* accurately stated the effect of it thus:—Where there is a devise of land, or a devise of land in a particular place, or a general devise of land which would include copyholds  
 or

(a) 7 *M. & W.* 1.  
 (b) 6 *Ves.* 633.  
 (c) 2 *Y. & Coll. C. C.* 279.  
 (d) 5 *Ves.* 540.  
 (e) 1 *Eden*, 151.

(f) 12 *Sim.* 123.  
 (g) 5 *Beav.* 1.  
 (h) 1 *Macn. & G.* 518.  
 (i) 2 *De Gex & Smale*, 722.

or leaseholds, if there were no freeholds, in all those cases it shall include leaseholds and copyholds, even though there be freeholds. That being the substance of the clause, apply it to this will. We have a devise of all manors, messuages, lands, tenements and hereditaments situate at *Windlestone* and certain other specified places. Now if the will had stopped there, there could be no question with respect to the application of the statute to this devise, because this is precisely a case in which the testator has devised all his land at a particular place, namely, at *Windlestone, &c.*, which, if he had no freehold there, his leaseholds at or near those places would, before the statute, have passed. The contrary has not, nor in fact could it reasonably have been argued. Then the will proceeds: "and a parcel of land purchased by me of the late Mrs. *Mary Lambton*, near *Northallerton*, in the North Riding of the county of *York*; and all other my real estates in the counties of *Durham* and *York* and elsewhere in *Great Britain*, and all my estate and interest therein." It is contended, that those words, "all other my real estate," produce a difference in description from that previously contained with respect to his lands at or near *Windlestone*. Now the first thing to consider is, whether they are or not part of the description of the lands previously devised; and the next is, whether, if they are not part of the description, you can by inference or implication cut down the effect of those words, which, if they stood alone, would undoubtedly have included leaseholds if there had been no freeholds. I am of opinion, that "all other my real estates" are not such words of description, but that there are three distinct items enumerated here. First, the "manors, lands," &c., "at or near *Windlestone*, in the county of *Durham*," &c. Secondly, "a parcel of land at or near *Northallerton*, in the county of *York*." And thirdly, "all other my real estates in the counties of *Durham*

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*Durham and York* and elsewhere in *Great Britain*, and all my estate and interest therein." I do not, therefore, read the will in the same manner as if the testator had said "all my lands and my real estate at or near *Windlestone*, in the county of *York*," which, if I were to adopt the argument of counsel, I should be compelled to do, and read the clause so as to incorporate the words "real estate" in the description of the lands at or near *Windlestone*. In my opinion, I cannot properly do so. But besides this, it has been argued, that this is analogous to what frequently occurs in this Court, where a man gives "all his furniture, plate, linen, china and other personal property;" and the question arises, what is the meaning of those words, "other personal property," and those are said to be words *ejusdem generis*. And it is contended in this case, that the words "other real estate" are to be treated as words *ejusdem generis*, that is to say, a general description of the things previously enumerated. Now I have already stated, that in my opinion it does not form part of the description of the lands previously devised; but if they are words *ejusdem generis*, it is new to me to say, that words *ejusdem generis* cut down the effect of the previous specific and particular gift. The authorities show, that general words are themselves cut down by the effect of the previous enumeration, but not that those general words cut down the prior enumeration. Suppose the words "real estate" to mean nothing but freehold, then if, in fact, the true construction of the previous clause in the will is to give all his freehold, copyhold and leasehold estates at or near *Windlestone*, the subsequent words, "and all other my freehold estates," cannot cut down the effect of the prior distinct gift of freehold, copyhold and leasehold, and limit those words to freehold only. The question, therefore, remains as before, what is the effect of the words in the previous  
part

part of the clause? and the statute says that if they stand alone, they shall include leaseholds.

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I am therefore of opinion, that the words "real estate," if restricted to mean freehold simply, could not cut down the effect of the previous gift. I therefore concur in the opinion of the learned Judges on this subject, and I must confirm their decision, and make such directions as are consequential on it.

There is one other observation which I should wish to make on the statute. It was argued, that there must be something in the words pointing specifically to copyhold or leasehold estate; but I read the words of the statute as meaning nothing more than this,—that a devise of land in the particular place which would, before the statute, have included leaseholds if the testator had no freeholds there, shall, after the statute, include leasehold, even though there be freehold there, unless a contrary intention shall appear.

The costs of all parties should come out of the estate.



1852.

July 20.

## COCKELL v. BACON.

Right of *eigné* as against a *puisé* mortgagee to enforce all his remedies at the same time.

By a deed, the amount due to the first mortgagee was confirmed to him by the subsequent incumbrancers, and he thereby agreed not to execute his power of sale for a limited time. Held, that a party, who by his bill contested the amount so admitted to be due to the first mortgagee, could not take advantage of the stipulation in the deed not to sell within the time, and an injunction to restrain such sale was refused.

UNDER the powers contained in a trust deed of the 23rd of *February*, 1842, entered into by a number of incumbrancers on Mr. *Trevanion's* estates, a mortgage was, on the 14th of *March*, 1843, executed by the trustees to *Rhodes* for 16,620*l.*, and which contained a power of sale.

Under the powers contained in the same deed, a mortgage for 4,000*l.* was, on the 15th of *March*, 1843, executed by the trustees to *Davis*, which was made expressly subject to the prior mortgage, which it recited.

On the 28th of *November*, 1843, certain annuitants filed their bill against *Rhodes*, *Davis* and others (*Holloway v. Trevanion*), contesting the amount of *Rhodes's* security. The parties agreed to compromise; and by a deed of the 28th of *February*, 1844, the Plaintiffs in that suit confirmed the amount of *Rhodes's* mortgage; and *Rhodes*, on his part, covenanted not to exercise the power of sale, until after the expiration of twelve calendar months from the day on which some final decree should have been made in Chancery to rectify the marriage settlement of Mr. *Trevanion*.

*Davis* was no party to this deed, though privy to the transaction. A suit was afterwards instituted for rectifying the settlement (*Walsh v. Trevanion*), in which a decree had been made, but it was alleged that the twelve months had not expired since the final decree.

The

The present suit (*Cockell v. Bacon*) was instituted by the assignee of *Davis's* mortgage, impeaching *Rhodes's* security, and contesting the amount due thereon; and *Rhodes* being about to sell the property, in order to realize his security, a motion was now made, on behalf of the Plaintiff *Cockell*, to restrain *Rhodes* from selling or attempting to sell the mortgaged property.

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Mr. *Roupell* and Mr. *Hetherington*, in support of the motion, insisted that *Rhodes* was, by the compromise of 1844, barred from exercising the power of sale until December, 1852 (being twelve months, as they alleged, after the final decree). They cited *Matthie v. Edwards* (a).

Mr. *Willcock*, Mr. *Tennant*, Mr. *Shapter*, Mr. *R. Palmer*, Mr. *G. L. Russell* and Mr. *Lloyd*, were not heard.

The MASTER of the ROLLS.

I do not see my way to granting this motion, which is contrary to the ordinary principles and practice on which the court proceeds. In a suit by a *puisé* mortgagee for redemption, the practice is, to leave the prior mortgagee in possession of all his rights under his mortgage deed, and to allow him to pursue all his remedies. He may, at the same time, take possession of the estate, sue the mortgagor on his covenant, and proceed to foreclose. Though this is the rule, cases of fraud or special contract may however arise, in which the mortgagee may be prevented enforcing the remedies which he would otherwise be entitled to.

This

(a) 2 *Collyer*, 465, reversed 11 *Jurist*, 504.

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This is a bill by a *puisné* against a prior mortgagee to redeem him, and to cut down his securities, on the ground that they are usurious, and that they ought, therefore, to stand as a security only for the money actually advanced. I cannot decide this on an interlocutory application; I must hold these securities valid until they have been set aside. It being admitted that something is due, I am at a loss to conceive on what principle a subsequent incumbrancer can come and prevent a prior mortgagee exercising his power of sale. I asked for some authority, and *Matthie v. Edwards* (a) was referred to, but that case was reversed by the Lord Chancellor on appeal (b). It was originally decided on the ground that the power had been exercised in an oppressive manner and improperly injurious to other persons, but having been reversed, it is no longer an authority.

The other ground relied on is this:—The Plaintiff says, that a contract was entered into between certain persons, by which it was agreed, that *Davis* should not dispute the validity or extent of the incumbrancer's claim, and by which the Defendant contracted not to exercise the power of sale until *December*, 1852. The Defendant contends, that as the Plaintiff claims under *Davis*, this contract is binding on him, and that he cannot dispute the amount due to him.

I express no opinion whether such equity can be maintained. I am of opinion, however, that the Plaintiff cannot say, "I am entitled to the benefit of this contract, so far as it prejudices the Defendant, and repudiate it to the extent it benefits him."

If

(a) 2 *Collyer*, 465.

(b) 11 *Jurist*, 504, 761.

If the Plaintiff had sought the specific performance of the agreement and had admitted the Defendant's right, the case might be different; but I am of opinion that the Plaintiff cannot say, that the Defendant shall be bound by the deed of *February*, 1844, and at the same time impeach it. I am therefore of opinion that the motion to restrain the exercise of the power of sale cannot be maintained.

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STOCKER v. DEAN.

July 24, 26.

DEBORAH SETCHFIELD was the owner of a shop and premises at *St. Ives*, and of an adjoining cottage and premises called the *Globe*, both of which were vested in *Fisher* as a trustee for her.

A right of pre-emption held limited to the life of the owner of the property.

Semble, that a right of pre-emption, "at all times thereafter," cannot be enforced after the death of the owner of the property.

By an agreement, dated the 3rd of *June*, 1834, *Fisher*, with the consent of *Deborah Setchfield*, agreed to sell the shop and premises to the Plaintiff *Stocker* for 1,100*l*. And it was further agreed, that in case *Deborah Setchfield* "should wish to sell the adjoining messuage" (the *Globe*), she would request *Fisher* (who thereby promised to accede to such request) to surrender or convey the adjoining messuage, with the appurtenances, to and at the whole expense of the Plaintiff *Stocker*, and his heirs or appointees, for the sum of 200*l*., he paying for all and every the grates, stoves, shelves and other fixtures which might, at the time of such surrender or conveyance, be on the same messuage or tenement. And it was agreed, that until the adjoining messuage should be sold and conveyed to the Plaintiff, he should have a limited right of way through the yard of the *Globe*. And for the true performance of the agreement, each of the parties bound himself unto the other in the sum of

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200*l*.,

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200*l.*, which was thereby declared to be in the nature of liquidated damages.

By a contemporaneous agreement of the same date, and made between *Fisher* and *Deborah Setchfield* of the one part, and the Plaintiff of the other part, it was agreed, that if the *Globe* should not be surrendered to the Plaintiff before *Michaelmas*, 1834, the same should be surrendered and conveyed to *Deborah Setchfield*, and that she should enter into a covenant, at the expense of the Plaintiff and *Deborah Setchfield*, for herself, her heirs and assigns, *at all times thereafter, to give to the Plaintiff, his heirs and assigns, the right of pre-emption of the Globe*, with the appurtenances, at the price of 200*l.*, he paying for the stoves, grates, shelves and other fixtures which, at the time of the purchase, should be in the said cottage.

The purchase of the shop, &c. (being the first-mentioned property) was completed, and in *October*, 1834, the *Globe* was conveyed to *Deborah Setchfield*. She died on the 28th of *July*, 1850, having made her will, whereby she directed her trustee to sell the *Globe*, and she declared that the trustee's receipts should be good discharges.

The property was accordingly put up for sale by auction in *July*, 1851, when the Plaintiff, as he alleged, in ignorance of his rights, bid the sum of 360*l.*, but it was ultimately bought in for 450*l.*

The Plaintiff filed this claim against the trustee, on the 5th of *April*, 1852, insisting, that as *Deborah Setchfield* was, at her death, desirous of selling the *Globe*, the Plaintiff's right of pre-emption had arisen, and praying a specific performance.

Mr.

Mr. Willcock and Mr. G. T. White, in support of the claim. The Plaintiff has purchased for valuable consideration the right of pre-emption of this property, and immediately *Deborah Setchfield* expressed her wish to sell, the Plaintiff's right to a specific performance arose. There has been no delay since the death of *Deborah Setchfield*, and the bidding at the sale was made by the Plaintiff in ignorance of his rights.

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Mr. Lloyd and Mr. Nalder, *contra*, argued, first, that a power to purchase at all times hereafter, not preceded by an estate tail, by means of which it might be destroyed, was void as trenching on the rules against perpetuities: 2 *Sugden's Powers* (a), *Ware v. Polhill* (b). That it was like a shifting use on a conveyance of an estate to A. and his heirs, whereby if B. should, at any time thereafter, wish to purchase it, the estate should go over to B. and his heirs. Secondly, that to make it valid, the power must necessarily be limited to the life of the vendor, and that, therefore, the Plaintiff's right ceased on her death. Thirdly, that this was an improvident and unreasonable contract, which this Court would not enforce, for it gave an option to the Plaintiff, at all times thereafter, to purchase the property without reference to its then value or to the improvements made on it, at a fixed price of 200*l.* (c). Fourthly, that the second agreement was distinct from the first, and wanted a sufficient consideration; and, lastly, that the Plaintiff had, by delay and bidding at the sale, waived his right to insist on the specific performance of the contract.

Mr. Willcock, in reply, cited *Southcomb v. The Bishop of Exeter* (d).

The

(a) Page 472 (7th ed.)
(b) 11 *Ves.* 257.

(c) See *Lawrenson v. Butler*,
1 *Sch. & Lef.* 18.
(d) 6 *Hare*, 213.

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The MASTER of the ROLLS.

If the case stood on the first agreement, I should be of opinion that the contract was confined to the life of *Deborah Setchfield*. The words are, "in case *Deborah Setchfield* should wish to sell." This is confirmed by the subsequent passage, by which it was agreed, that she would request *Fisher* to convey, and he promised to accede to such request. It is manifest they anticipated that something was to be done by *Deborah Setchfield*, personally, when this contract was to be carried into effect, and this limits the right to the case of her wishing to sell in her lifetime. This is the natural import of the words, and it would be a strained construction of the contract to say that it applied to such a state of things as the present. Suppose she had, by her will, given a succession of life estates in this property, and had directed, that after the death of the last tenant for life the property should be sold and the produce divided amongst the children of the tenants for life. This might not happen for seventy or eighty years after her death, and it would not be reasonable to keep the right suspended during that period. I do not think that it is the natural import of the words to give, as against her representatives, the right of pre-emption. On the construction of the first part of the contract, I am of opinion, that this was a right of pre-emption to be exercised during the life of *Deborah Setchfield* only.

The other agreement is this. It is at all times thereafter to give the Plaintiff, his trustees and assigns, the right of pre-emption. It has, I think, been properly argued, that this is either an addition to the first contract or a distinct agreement independent of and superseding it. I think I cannot treat it as superseding the former

former contract. If I could treat it as a distinct and separate contract, I should require much more argument to convince me that a contract which gives a right of pre-emption, "at all times hereafter," is one which could be enforced after the death of the owner of the property.

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I think this was an addition to the former contract, by which it was agreed, that it should be sold under certain conditions to be secured by an express covenant to be drawn, if the parties required it, at the joint expense of the Plaintiff and *Deborah Setchfield*; but I think it does not extend or enlarge the meaning of the first contract. It would be absurd to suppose, that any person should be desirous of selling property at a distant period for the same price.

On the whole, I am of opinion that the contract was to be enforced in the life of *Deborah Setchfield*, in case she should, during that period, wish to sell the property. The Plaintiff fails, and I must dismiss his claim with costs.

1852.

July 26.

SOUTHERN v. WOLLASTON.

Bequest to A. for life, with remainder to such of his children as should live to attain twenty-five, equally, with an imperative direction, that the interest thereof, while any person presumptively entitled should be under twenty-five, should be applied for his maintenance, and a discretionary power of advancement. Held void for remoteness.


The marginal note of *The Marquis of Bute v. Harman*, 9 Beav. 320, is incorrect, the bequest having been held void for remoteness.

THE testator bequeathed 2,000*l.* consols to trustees, upon trust for his nephew *Francis Richard Southern*, for life, and after his decease, upon the trusts following:—"Upon trust for such of the children of *Francis Richard Southern* as shall be living at his death and shall have attained, or shall afterwards live to attain, the age of twenty-five years, if more than one, in equal shares, and if but one, then for such one only, to and for his, her and their own absolute use and benefit; and if all of them shall depart this life under the age of twenty-five years, then the said sum of 2,000*l.* stock shall (subject to the life interest of my said nephew therein, and the power of advancement hereinafter contained) sink into my residuary personal estate.

"And I direct, that the interest, dividends and annual produce thereof, while any of the persons presumptively entitled shall be under the age of twenty-five years, shall (subject to the power of advancement hereinafter contained) be paid and applied for and towards the maintenance and support of the person or persons to whom the same shall, for the time being, apparently or presumptively belong."

In a subsequent part of his will, the testator declared and directed, that it might be lawful for his trustees "to pay and apply the whole, or any part of the several provisions thereby by him intended for the children of his nephew *Francis Richard Southern*, for the placing or putting of him, her or them, in or to any business,

business, profession or employment; or otherwise for his, her or their benefit or advancement in the world." But during the life of *Francis Richard Southern*, with his consent, and after his death his trustees and executors, were to make such payment and advance in their discretion.

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The testator died in 1845.

Francis Richard Southern died in 1846. He had three children, who were respectively born in 1823, 1824 and 1827.

The question was, whether the gift to such children, as should live to attain twenty-five, was or was not void for remoteness.

Mr. *R. Palmer* and Mr. *Rogers*, in support of the validity of the gift. Sir *William Grant* considered that a gift "to persons of any description when they attain twenty-five, or upon their attainment of twenty-five, or from and after their attaining twenty-five," was "precisely the same thing as if you gave to such of those persons as should attain twenty-five," *Leake v. Robinson* (a). Therefore this gift may be construed in the same way, and be held vested. Here there is a gift of the whole income for the maintenance of the children while under twenty-five, with a power to advance them out of the capital; the gift of the whole income, in the meanwhile, has, in several cases, been held to have the effect of vesting legacies, which would otherwise be contingent, *Davies v. Fisher* (b), *Harrison v. Grimwood* (c), *Marquis of Bute v. Harman* (d).

Mr. *Lloyd*, *contra*. It appears from *Boreham v. Bignall*

(a) 2 Mer. p. 386.
 (b) 5 Beav. 201.

(c) 12 Beav. 192.
 (d) 9 Beav. 320.

1852. *nall* (a), that in the *Marquis of Bute v. Harman*, the bequest was held void (b). There is an immediate right to the income, but the payment of the capital is postponed until twenty-five, *Milroy v. Milroy* (c).

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The gift of the income for the maintenance might be good, though the bequest of the capital is too remote, *Webb v. Kelly* (d), *Soames v. Martin* (e), *Kilvington v. Gray* (f), *Saunders v. Vautier* (g), was also cited.

Mr. Roupell, Mr. Elmslie, Mr. Bird, Mr. Sheffield, Mr. Rendall, Mr. Baggallay and Mr. Thring, for other parties, were stopped by

The MASTER of the ROLLS, who, after referring to *Vawdry v. Geddes* (h), and *Boreham v. Bignall* (i), as not distinguishable from the present case, said, that although the disposition of the Court was to give effect, if possible, to the expressed wishes of a testator; yet he was satisfied that the decisions were too strong to permit him to hold that this gift to the children was otherwise than void for remoteness.

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| (a) 8 Hare, 133, n. (d). | (d) 9 Sim. 469. |
| (b) The Registrar's book was sent for, when it was found that the gift was declared void for remoteness.— <i>Reg. Lib.</i> 1845, B., fol. 1086. | (e) 10 Sim. 287. |
| (c) 14 Sim. 48. | (f) <i>Ibid.</i> 293. |
| | (g) <i>Cr. & Ph.</i> 240. |
| | (h) 1 Russ. & Myl. 203. |
| | (i) 8 Hare, 131. |

NOTE.—See *Porter v. Fox*, 6 Sim. 485; *Newman v. Newman*, 10 Sim. 51; *Bull v. Pritchard*, 5 Hare, 567, 571; *Hanson v. Graham*, 6 Ves. 239; *Watson v. Hayes*, 5 Myl. & Cr. p. 133; *Blagrove v. Hancock*, 16 Sim. 371.

1852.

WHEELER v. CLAYDON.

July 28.

THE testator, by his will, made a number of devises and bequests. And "charged with the payment of his just debts and his funeral and testamentary expenses and pecuniary legacies," he devised "all and every other" his manors, hereditaments and premises, to his nephews and nieces.

A testator, by his will, made a general devise of his real estates to his nephews, charged with his debts and legacies. By a codicil, he devised a freehold house to A. B., it being his wish that she should reside therein if she should think fit. Held, that the house was exempt from the charge of debts and legacies.

By a codicil, he devised to *Sophia Hills* a house in *Green Street, Cambridge*, "it being his wish, that she reside therein if she should think fit."

The question was whether the *Green Street* house was charged with the debts and legacies.

Mr. *Eddis*, for the Plaintiff.

Mr. *R. Palmer*, for the Defendant.

The MASTER of the ROLLS.

I have no doubt that the house is exempted from the charge of debts and legacies.

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July 28.

YEATS v. YEATS.

Bequest in
1829 of 40l.
a-year to each
of the seven
children now
living of
J.S.Y. He had
nine children
then living.
Held, that
they all took.

JAMES YEATS, the testator, by his will, dated the 17th day of *April*, 1829, bequeathed as follows :
“ I give and bequeath, after my decease, to each of the seven children now living of my nephew *James Sebastian Yeats*, of *Streatham*, in the county of *Surrey*, and who survive me, an annuity of 40*l.*” And he subjected certain lands to the payment of those annuities.

It appeared that in 1798 the testator retired to *Devonshire*, and had no intercourse or communication with his family, who lived at a distance of 212 miles, but being in bad health, and about to go abroad, he, in 1828, had caused some inquiry to be made by a Mr. *Waller* respecting his nephew's family. Mr. *Waller*, in *May*, 1828, wrote to the testator to say, that it consisted of two sons and five daughters, and this information was then accurate, but in *September*, 1828, the nephew had two more sons, *George* and *William*, born.

The testator's will was made on the 17th of *April*, 1829, so that, at that time, the nephew had nine and not seven children. All the children survived the testator.

By the decree, it was referred to the Master to inquire, what children of *James Sebastian Yeats* were living at the date of the will. And in case the Master should find, that at the time of making the will, *James Sebastian Yeats* had more than seven children living, then he was to inquire which of the children of *James Sebastian*

Sebastian Yeats were, by the said testator, intended to take the annuity of 40*l.* each.

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v.
YEATS.

The Master, after finding the above circumstances, stated his opinion, that the seven elder children were, by the testator, intended to take the annuity of 40*l.*, and he thus excluded *George* and *William*.

An exception was taken to his report, insisting that these two children were included.

Mr. *R. Palmer* and Mr. *Hetherington*, in support of the exception, relied on *Daniell v. Daniell* (a).

Mr. *Roupell*, Mr. *Karslake*, Mr. *Lloyd*, and Mr. *Cole*, cited *Dowset v. Sweet* (b), *Careless v. Careless* (c), 1 *Roper on Legacies* (d).

The MASTER of the ROLLS.

This exception must be allowed, on the authority of *Daniell v. Daniell*.

The admissibility of extrinsic evidence was decided at the hearing, and the question now is, whether the Master has come to a right conclusion, when he finds that the testator intended the seven elder children only.

The principle on which this Court acts is well settled by authority. Where a testator gives a legacy between a class of persons, or separate and distinct legacies to each of a class, if the Court finds there are more of the class than those specified by the testator, it endeavours to

(a) 3 *De G. & Sm.* 337.
(b) 1 *Ambler*, 175.

(c) 1 *Mer.* 384.
(d) 4th ed. 160.

1852.

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v.

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to find which of them were really meant; and if it is unable to discover them, then, in order that the legacy may not fail altogether, it infers or presumes that the testator intended to include all the class, notwithstanding the numerical error.

I concur that this is not a very satisfactory presumption, and that the Court ought not, unless driven to that result, to adopt it. I am disposed to think that but for the case of *Daniell v. Daniell* I should have agreed with the Master. The Court will not allow the legacy to fail, if, on the evidence, it can be avoided, and I think *Daniell v. Daniell* in point. That appears to have been a stronger case than the present, for in this case the testator intended to include all the children of the nephew, but being informed that there were seven, and he gives to each of the seven children then alive. That was a misapprehension of the facts, for there were then nine. In all these cases where a presumption is raised, the testator has either been misinformed as to the state of the family, or has prepared his will from some mistaken recollection. I think the nine entitled, and I must therefore allow the exception.

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NOTE.—See *Garvey v. Hibbert*, 19 Ves. 125; *Scott v. Fenoulhett*, 1 Cor. 79; *Stebbing v. Walkey*, 2 Bro. C. C. 85; *Harrison v. Harrison*, 1 Russ. & M. 72; *Hare v. Cartridge*, 13 Sim. 165; *Lee v. Pain*, 4 Hare, 201; *Morrison v. Martin*, 5 Hare, 507; *Berkeley v. Palling*, 1 Russ. 496.

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1852.

PLENTY v. WEST.

**T**HE questions in this case arose on the construction to be put on certain testamentary papers constituting the last will of the testator named *William Budd*.

By the first of them, bearing date the 5th of October, 1837, and duly attested to pass real estate, the testator gave all his property, real and personal, to *Henry Budd* and *William* and *Frederick Vincent* and their heirs, executors, &c., in trust to divide the same between *Caroline Simmons* (now Mrs. *Plenty*) and the three boys of *William West*.

The second testamentary instrument bore date the 13th of April, 1838, and was duly attested for passing real estate, and commencing in these words—"This is the last will of me *William Budd*," of &c. "I give and bequeath all my estate and effects as hereinafter men-

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A testator left four testamentary instruments, duly executed.

After the Ecclesiastical Court had held that the second and third alone were valid as to the personal estate, this Court, on the certificate of the Common Pleas, decided, that as to the real estate, the last instrument alone constituted the last will.

A testamentary paper relating to real

estate alone, commencing "This is the last will and testament of me relating to all my real estate whatsoever," held totally to revoke a prior will. Personalty, being the primary fund for the payment of debts, must be so applied, unless there be an intention expressed, not only to charge the real estate, but also to exonerate the personal estate.

A testator, by a testamentary paper not admitted to probate, but held effectual as regards his real estate, directed his trustees, to whom he had devised his real estate, in the first place, out of the rents and profits of his said estate, to pay all his just debts, funeral and testamentary expenses, and all costs, &c. Held, that this not only charged the real, but exonerated the personal estate.

DATES.

|                                    |                                    |
|------------------------------------|------------------------------------|
| 1837. 1st Testamentary Instrument. | 1839. 4th Testamentary Instrument. |
| 1838. 2nd Ditto.                   | 1840. Death.                       |
| 1838. 3rd Ditto.                   |                                    |



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tioned." The testator then proceeded to give his household goods at *Newbury* to *Caroline Simmons*. He gave all his real estate, as well freehold, copyhold or leasehold, to *Caroline Simmons* for life, with remainder to *William West* for life, and after the decease of both, to *William* and *George*, the sons of *William West*, for life and the life of the survivor, and then he devised a copyhold estate at *Burghclere* to *Henry Budd*, subject to a legacy of £500.

By the third testamentary instrument, on the same sheet of paper and bearing date the same day, the testator appointed *Caroline Simmons* and *William West*, the father, executrix and executor of his will.

The fourth and last testamentary instrument was not dated, but was executed by the testator on the 13th of the month of *November*, 1839. It was duly attested to pass real estate. It proceeded as follows:—" *This is the last will and testament of me the undersigned William Budd of,*" &c., "relating to all my freehold and copyhold lands, tenements, hereditaments and all my real estate whatsoever," &c., which I hereby give and devise and bequeath to *William West* and *William* and *Frederick Vincent* and their heirs, in trust to receive the rents and divide them into three equal parts, one-third whereof he gave to *Caroline Simmons* for life for her separate use, subject to an annuity of 50*l.* to *Frances Simmons*, her mother, for her life. And he directed the other two-thirds of the rents to be paid to all the children of *William West*, or permit *William West* to receive such rents for the use, maintenance and education and putting forth in the world of all his children until their arrival at twenty-one years. The testator then proceeded:—"And I hereby will and direct that my said trustees shall, *in the first place*, either out of the rents and profits  
of

of my said estates, pay all my just debts and funeral expenses, and all the costs, charges and expenses which they may incur or be necessarily put unto in the execution of the trusts of this my will." And he appointed his trustees executors of his will, so far as the same was necessary to the performance of the trusts relating to his real estate.

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The testator died on the 26th *August*, 1840. Probate was granted of the second and third testamentary instruments, bearing date the 13th *April*, 1838, by the Ecclesiastical Court, but the Court refused to admit to probate the first (a) and the last of such documents. The last (the *Master of the Rolls* said) was probably refused admission to probate on the ground that as it related exclusively to real estate, the Ecclesiastical Court had no jurisdiction in that matter. To determine the question arising on these instruments and to administer the estate of the testator, a bill was filed by *Caroline Simmons*, who had married Mr. *Plenty*, against the *Wests* and all other persons interested in the determination of these questions. This cause came on to be heard in *April*, 1846, when a decree was pronounced, sending a case for the opinion of the Court of Common Pleas, on the construction of the testamentary instruments. The case was stated, omitting the devise to trustees in the beginning of the first and in the beginning of the fourth instrument, and the questions proposed to the Court were, first, which of the above instruments constituted the testator's will as to his freeholds? and, secondly, what estates and interests the several persons took in the freeholds and copyholds? Unfortunately the devise at the end of the last testamentary instrument, stating that the trustees were to be executors of the will so far as the same was necessary for

(a) This was so stated by counsel, but see 1 *Robertson*, 264.

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for the due performance of the trusts relating to the real estate, was allowed to remain, substituting the name of *William West* for that of the trustees. The consequence was that the Court of Common Pleas thought that this devise, so expressed, constituted *William West* the trustee, and gave him the legal estate (a). This frustrated, in a great measure, the object the Court had in putting these questions to the Court of Common Pleas. On the 14th of *June*, 1848, the Judges of that Court returned their certificate to the following effect:—

On the first question they were of opinion, that the instrument of *November*, 1839, was the only one which had any validity, as far as the legal rights of the claimants were concerned.

On the second question they were of opinion, first, that Mr. *Plenty* and his wife took no legal estate or interest in the real property devised; secondly, that *William West*, the father, took at law, as trustee, an estate in fee in one undivided third part of the real estate, and that he took an interest in the remaining two third parts of the real estate during the minority of his children, determinable as to the respective shares of his children, in the said two-thirds, on their respectively attaining the age of twenty-one years. Thirdly, fourthly and fifthly, that *William West*, the son, *George West*, *Frederick West* and *Ann West*, took in remainder in fee, as joint tenants, expectant on the determination of the estate of their father, in their respective shares of the aforesaid undivided two third parts of the real estate. Sixthly and seventhly, that *Henry Budd*, *William Simmons* and *Frances* his wife, took no legal estate or interest in the real property devised.

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(a) See 6 C. B. Rep. 201.

The cause now came on for consideration as to the effect of this certificate, and to decide on the interests of the several parties under the several testamentary instruments.

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The questions were, first, whether the last testamentary instrument of 1839 revoked the first of 1837, so far as the interest of the Plaintiff Mrs. *Plenty* was concerned; in other words, whether the reversion in that one-third of the real estates which was by the last will of 1839 given to *Caroline Simmons* for life, belonged to her under the first will, or belonged, subject to her life estate, to the heir of the testator, as undisposed of, and if so, whether it was also subject to the life interest to *William* and *George West*, the sons of *William West* the elder, under the second testamentary instrument.

Secondly.—Whether, by the words of the last testamentary instrument of 1839, as between the devisee and specific legatees, the real estate was to be made to contribute, in the first place, for the deficiency of the personal estate not specifically bequeathed.

Mr. *Roupell* and Mr. *Busk*, for the Plaintiff Mrs. *Plenty*.

Mr. *Glasse*, for the testator's heir-at-law.

Mr. *R. Palmer*, Mr. *Drewry*, Mr. *Speed*, Mr. *Wickens* and Mr. *Erskine*, for other parties.

Willet v. Sandford (a); *Hitchins v. Basset* (b); *Harwood v. Goodright* (c); *Jackson v. Jackson* (d); *Walsh v. Gladstone* (e); *Lord Walpole v. The Earl of Cholmondeley* (f).

Thomas

(a) 1 Ves. sen. 186.

(b) 2 Salk. 592.

(c) 1 Cowp. 87.

(d) 2 Cor. 35.

(e) 13 Sim. 261.

(f) 7 Term Rep. 138.

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Thomas d. Jones v. Evans (a); *Doe d. Murch v. Marchant* (b); 8 *Viners, Abr.* (tit. *Devise, R. 3*) (c); 1 *Jarman on Wills* (d), were cited.

The MASTER of the ROLLS reserved his judgment.

Nov. 3.

The MASTER of the ROLLS. I reserved my judgment on two questions.

Upon the first question, I am of opinion that the will which bears date the 5th of *October*, 1837, was revoked wholly and entirely by the will which was executed on the 13th *November*, 1839. In the first place, this instrument is intituled "the last will and testament of me relating to all my real estate whatsoever." This, by several decided cases, has been treated as a strong circumstance to be regarded in the question whether an instrument will operate as a revocation of all previous wills and testamentary instruments. I am confirmed in this view of the case by the circumstance, that, although the testator declares this to be his last will and testament, he limits and confines its effect, in this respect, to his real estate, by which he avoids revoking the testamentary instruments of *April*, 1838, so far as they relate to personal estate. It is to be observed also, that the contents of this will of 1839 are at least, so far as the legal estate is concerned, wholly inconsistent with the will of 1837, as he creates a new set of trustees, and gives them the legal estate in fee simple in the whole of his freehold and copyhold estate; and although it be a just rule of construction, that revocation by inconsistency of disposition

(a) 2 *East*, 488.(b) 6 *Mun. & G.* 813.

(c) Page 141, (2nd ed.)

(d) Pages 157, 159.

sition shall only affect the prior existing instrument, to the extent that such inconsistent disposition is operative, which rule, if the instrument of 1837 were admitted to be a subsisting testamentary instrument, would leave the reversion in one-third given to *Caroline Simmons* by the first instrument undisposed of by the last will, yet it is impossible not to observe, that to give her a life interest, although it be for her separate use, infers an intention that she was to take no other or greater interest than a life estate in that third. In truth, the whole disposition of the legal and of the beneficial interest, as far as it goes, is inconsistent with the will of 1837. No intention can, in my opinion, be presumed, that the reversion in fee in one-third, subject to the life estate of *Caroline Simmons*, should belong to her, and that the first will should be kept alive and made operative for this purpose alone. If I considered the first will as unrevoked by the last, I should, on the same principle, be bound to let in the will of 1838, and to give *William* and *George West*, the two sons of *William West* the elder, estates for life after the decease of *Caroline Simmons*, in the third of the real estate devised to her for life. In my opinion, this is inconsistent with the plain construction of the will of 1839.

And I am of opinion, that the will of 1838 was intended, by the testator, to revoke, and that it does revoke, the will of 1837 wholly, both as to real and personal estate, and that the will of 1839 was also intended to revoke, and that it does revoke, the will of 1837 wholly, both as to real and personal estate, and that the will of 1839 was also intended to revoke, and that it does revoke, the wills of 1838, so far as regards the real estate of the testator. I am of opinion, therefore, that the reversion in the one-third of the real estate

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estate, subject to the life interest of Mrs. *Plenty*, is not disposed of by the wills of the testator.

The next question I have to consider is, whether, as between the devisees and the specific legatees, the real estate is the primary fund for the payment of debts, and bound to exonerate the legatee of the leaseholds from any contribution thereto. The rule in this case is, that the personalty, being the primary fund for the payment of debts, must be so applied, unless there be an intention expressed, not only to charge the real estate, but also to exonerate the personal estate.

The question is, whether such an intention appears on this will; for this purpose the two wills must be again considered. The will of 1838 gives all the testator's household goods at *Newbury* to *Caroline Simmons* for ever, and it also gives all his leaseholds to her for life. By the will of 1839 the testator proposes to dispose of "all his freehold and copyhold" estate, and "all his real estate whatsoever;" but as it has not been admitted to probate, it has no effect on any part of the personal estate, and does not include any chattels real, although subject to the Statute of Wills^(a). This will, therefore, so confined, gives all the freehold and copyhold property of the testator upon certain trusts; and at the close directs, that his trustees "shall, in the first place, either out of the rents and profits of his said estates, pay all his just debts, funeral expenses, and all the costs, charges and expenses which they may incur or be necessarily put unto in the execution of the trusts of his will." Such being the testamentary instruments, I am of opinion that there is to be found in them not merely an intention to charge the

(a) 1 *Vict. c. 26.*

the real estate, but an intention also to exonerate the personal estates bequeathed by the wills of 1838. The wills, in truth, include most of the circumstances which have been principally relied upon, in the authorities, for exonerating the bequeathed personal estate. In the first place, the executors and the trustees of the real estate are different persons, which was considered to be of importance by Sir William Grant in *Brydges v. Phillips*(a), and by Lord Eldon in *Boote v. Blundell*(b). In the next place, the trust is to pay all the debts and funeral expenses, and all costs and expenses attendant on the trusts of his real estate, and lastly, it is to be paid, "in the first place," out of the rents and profits, and therefore before the life estates are to take effect in possession. It is not necessary to refer to the authorities, which are very numerous, on this subject, and some of which deal with very nice distinctions, which do not, in my opinion, arise in this case. The result of my opinion is, that the personal estate specifically bequeathed by the will of 1838, is exonerated from any contribution towards the payment of the debts, funeral and testamentary expenses of the testator, and of executing the trusts of his last will.

The decree, therefore, will be to confirm the certificate of the Court of Common Pleas, to declare that the reversion in the one-third of the freehold and copyhold estates of the testator devised to *Caroline Simmons* (now Mrs. *Plenty*, the Plaintiff), subject to the life estate therein, is undisposed of and belongs to the heir at law of the testator, and that the household goods of the testator at *Newbury*, and his leasehold property bequeathed by the wills of 1838, are exonerated from any contribution towards the payment of the testator's debts and

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(a) 6 Ves. 567.

(b) 1 Merivale, 193.

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and his funeral expenses, and also the costs, charges and expenses attendant upon the execution of the trusts of the freehold and copyhold estates. The rest of the decree will be of course, and the costs must be divided, and so far as they relate to the execution of the trusts of the will of 1839, must be borne by the real estate devised by that will.

June 7, 8, 9.
Nov. 6.

CROUCH v. HOOPER.

Observations on the little reliance to be placed on the evidence of persons who strive to work out and sustain a particular pedigree.

In pedigree cases, if one link be assumed, any two persons may be proved to be related; and, therefore, in such cases, the difficulty usually consists in

THE question in this case was one of pedigree. It appeared that *Charles Crouch* died a lunatic and intestate in 1830, and the Plaintiff, amongst others, claimed, as representative of his next of kin, to be entitled to his residuary personal estate, which consisted of a sum of about 180,000*l*.

The Master having disallowed the Plaintiff's claim, she took exceptions to his report, which now came on for argument.

Mr. *Malins* and Mr. *Rogers*, for the Plaintiff, asked for an issue to try the question.

Mr.

properly weighing and considering the evidence relating to the connecting link.

In pedigree cases, it is a rule of evidence, that the declarations of deceased members of the family, *post litem motam*, are inadmissible; and anterior declarations are little to be regarded, unless corroborated by other circumstances.

Where witnesses are once impressed with the belief of their relationship to a given individual, they are apt in time, by talking and discussing the matter, to bring themselves over to a conscientious belief of family conversations and declarations tending to support that relationship, but which never took place.

Evidence of conversations with deceased persons is not given under the ordinary worldly sanction, from the difficulty, in such a case, of convicting the witness of perjury.

The absence, unexplained, of the baptismal certificate of the party forming the material link of a pedigree, while those of the other sons are carefully and regularly entered, forms a difficulty almost insuperable in substantiating the alleged pedigree.

The evidence of "experts," as to the age of a document and the character of the handwriting, may, in some cases, be valuable.

Mr. R. Palmer, Mr. Roupell, Mr. Boyle and Mr. Whitworth, *contra*, contended, that the Plaintiff had not made out even a *prima facie* case for further inquiry, the evidence being wholly inconsistent and contradictory.

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Mr. Malins, in reply.

The MASTER of the ROLLS reserved his judgment.

The MASTER of the ROLLS.

The question I have had to consider is, whether there exists, in this case, a sufficient *prima facie* case, on the part of the Plaintiff, to induce me to submit it to a further investigation. It is a trite but just remark, that if one link in a pedigree be assumed, any two persons may be proved to be related; and it is the usual observation, in these cases, that the difficulty consists in properly weighing and considering the evidence relating to some one link, which connects the line of the claimant with that of the intestate. In this case this remark is peculiarly applicable, for the whole case of the Plaintiff depends on the proposition that *Charles Crouch*, the father of *Charles Crouch* the intestate, was the son of *Thomas Crouch*, an inhabitant of the village of *Purbright* in *Surrey*, and of *Elizabeth* his wife. [*His Honor here stated the facts which were either not in dispute, or which were clearly established by evidence, and proceeded*]:—The fact in dispute is this:—the Plaintiff alleges that *Charles Crouch*, the father of the intestate, was the son of *Thomas Crouch* of *Purbright*, and the brother of *Richard Crouch*, the father of the Plaintiff's husband; or in other words, that her husband was the nephew of *Charles Crouch* the father, and one of the first cousins of the intestate, at the time of his decease. This is disputed by the Defendants,

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Defendants, and if this be established, it follows that the Plaintiff (as the representative of her husband) and her husband's relatives are entitled to the property left undisposed of by the intestate at his decease.

The evidence by which this disputed fact is endeavoured to be proved is the following, viz. :—the testimony of fourteen witnesses, to which I am about to refer, and the copy of a letter said to have been written by *Charles Crouch*, the father of the intestate, to his brother *Samuel Crouch*, the son of *Thomas Crouch* of *Purbright*.

Of the witnesses who seek to establish this identity twelve are members of the family and materially interested in the result, and two of the name of *Budd* and *Simmons*, who are strangers. This is the general character of the evidence, which I shall shortly refer to. [*His Honor here minutely examined this evidence, which consisted of conversations and statements of the family.*]

There are several inconsistencies apparent upon the evidence of these witnesses, which I shall notice presently ; but even if this evidence stood by itself, and was not affected by any inconsistencies, I should still pay very little attention to it, unless corroborated by other circumstances. It is a rule of evidence, in pedigree cases, that declarations *post litem motam* are not receivable in evidence. All this is evidence of declarations made before any question arose as to the succession to this property, but there is no trace that they were remembered or acted upon until after the contest had arisen. And though no complaint can justly be urged against persons for not giving the evidence before the occasion requires it, yet it must always be borne in mind, in judging of evidence

dence of this description, how extremely prone persons are to believe what they wish. And where persons are once persuaded of the truth of such a fact, as that a particular person was the uncle of their father, it is every day's experience, that their imagination is apt to supply the evidence of that which they believe to be true. It is matter of frequent observation, that persons dwelling for a long time on facts, which they believe must have occurred, and trying to remember whether they did so or not, come at last to persuade themselves that they do actually recollect the occurrence of circumstances which, at first, they only begin by believing must have happened. What was originally the result of imagination becomes in time the result of recollection, and the judging of which and drawing just inferences from which is rendered much more difficult, by the circumstance, that, in many cases, persons do really, by attentive and careful recollection, recall the memory of facts which had faded away, and were not, when first questioned, present to the mind of the witness. Thus it is, that a clue given or a note made at the time frequently recalls facts which had passed from the memory of the witness. I look, therefore, with great care and considerable jealousy on the evidence of witnesses of this description, even when I believe them to be sincere, and to be unable to derive any advantage from their testimony. Once impress the witnesses with the belief that *Charles Crouch*, the father of the intestate, was the brother of their grandfather, and the further steps follow rapidly enough. In the course of a few years, by constant talk and discussion of the matter, and by endeavouring to remember past conversations, without imputing anything like wilful and corrupt perjury to witnesses of this description, I believe, that in 1847 they may conscientiously bring themselves to believe, that they

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they remembered conversations and declarations which they had wholly forgotten in 1830, and that they may in truth *bonâ fide* believe, that they have heard and remember conversations and observations which in truth never existed, but are the mere offspring of their imagination. It is also always necessary to remember, that in these cases, from the nature of the evidence given, it is not subject to any worldly sanction, it being obviously impossible, that any witness should be convicted of perjury for speaking of what he remembers to have been said in a conversation with a deceased person.

These observations press themselves the more strongly upon me in the present case, because I observe, that although probably all, but certainly several, of the witnesses, were aware of the death of the intestate in 1830, it was not till the year 1847, that their memory has enabled them to speak to the facts, which ought to have been more present to their minds in 1830 than at the present time.

A difficulty almost insuperable in this case, if it rested here, is the omission of any entry of the baptism of the supposed *Charles Crouch* (the son of *Thomas Crouch* of *Purbright*) in any parochial register, although the baptisms of all the other sons are carefully and regularly entered, and which omission is unaccompanied by any explanation or suggestion to account for it. The story also remembered by the witnesses is not only not the same, but is inconsistent with each other, and in some cases the inconsistency is between statements of the same witnesses. [*His Honor here compared them.*] There are various other observations which occur, on the details of this evidence, which I consider it unnecessary to go through minutely. It is certain that much of this must be untrue, and the examination of the evi-

dence confirms the observations I have already made, and shows, to use the mildest terms, how easily witnesses, with a strong interest, persuade themselves that they remember matters which never had any existence at all. It is material also to test the value of this evidence by a reference to the dates and character of the proceedings in this cause. [*His Honor here referred to them and the variations made in the alleged pedigree.*] Much of the evidence given to support the first supposition is inconsistent with and does not support the altered case. I do not again refer to these inconsistencies; I think it sufficient to state, that I have carefully considered this evidence, and have satisfied myself, that the inconsistencies are not the mere differences which might arise from the imperfect recollection by different persons of a past fact, but that they are so considerable and so numerous, that no reliance can be placed on this evidence of declarations made in conversations with deceased persons; but that I am compelled to attribute them either to such causes as I have above referred to, or to a more serious and reprehensible one.

I place, therefore, no reliance on the evidence of these declarations, and I pass to the consideration of the copy of the letter produced, and which is said to have been found for the first time in 1846. If this letter be the copy of a genuine letter it establishes the case of the plaintiff. The letter is in these words: [*His Honor read and critically examined it, and showed that it contained as many mis-statements of fact as it contained positive allegations.*] In this case, I am compelled to balance probabilities, and I regret to say, that it appears to me more probable that persons having so great an interest in this matter as these witnesses have stated should endeavour to support their case, which they may and possibly do believe to be true, by the invention of such

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such a document as this copy, than that no attempt should, for so many years, have been made to discover whether any such a document was in existence, in the circumstances to which I have referred. The production itself, unlike that which is frequently the case in matters of a similar description, is a clumsy one; and, as I have already observed, it bears on its face the stamp of its want of genuineness. I therefore regret to say I must come to the conclusion, that the document is not the copy of any original document, and that it must be totally disregarded for the purposes of this case.

I have said nothing respecting the evidence of the *Experts* who speak to the age of the document and the character of the hand-writing. This evidence may, in some cases, be valuable; but in the view I take of this case, it does not tend, in the slightest degree, to corroborate the document itself, which I believe had no existence before the year 1830. I concur, therefore, in the view which the Master has taken on this part of the subject. The effect of disbelieving this paper is, that it necessarily casts a discredit on the rest of the testimony to which I have already referred.

I have not thought it necessary to state, in greater detail than I have already done, the observations which have occurred to me on the evidence. It is proper, however, that I should say a few words on the evidence which relates to gifts said to have been sent by *C. Crouch* from the *West Indies*. This, in my opinion, is not to be relied on, and confirms instead of weakening the conclusion to which I have already come.

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NOTE.—In a case of *In re the London Dock Company*, Nov. 1852, the *Master of Rolls* repeated this doctrine, observing as follows:—

“ I must repeat an observation I have lately made, that in cases of this description mere parol declarations, recorded or remembered,  
after

after the contest has arisen, by persons interested in the result of the litigation, have very little weight with me. In all such cases, the persons concerned invariably get talking about the matter—they confound that which they wish with what they have heard, and in a very short space of time, they persuade themselves, that they have heard, what, in truth, never had any existence. It is true, that this species of evidence is inevitable, because, usually, relations only have the opportunity of hearing such declarations, and they are necessarily interested in the result; but this only shows the necessary imperfection which attends the investigation of cases of this character, and renders it the more incumbent on a Judge carefully to sift and weigh the evidence given."

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STANSFIELD, on behalf, &c. v. HOBSON.

**I**N 1824, the six trustees of "The Union Building Society Club" mortgaged some of its property to the Defendant *John Hobson* for 1,000*l*.

In *March*, 1825, the same six and six additional trustees made a further charge to the Defendant for 1,000*l*.

In *November*, 1825, by a deed made between several subscribers executing it (said to be fifty-five) of the one part, and eleven persons (of whom five were the original twelve trustees), being the remainder of the subscribers and also trustees for the time being of the society, it was agreed that such eleven trustees should sell the mortgaged premises, pay off the mortgage, and divide the residue amongst the subscribers.

The original claim was filed by *Stansfield* (one of the two survivors of the six trustees mentioned in the first mortgage) against *Hobson* and *Stockdale* (the other survivors of the six trustees), for redemption. On the 8th of *November*, 1851, the *Master of the Rolls* allowed an objection

*Nov. 8.*

Since the 15 & 16 Vict. c. 86, the trustees of a mortgage represent the *cestuis que trust* sufficiently to protect the mortgagor, but where the surviving trustees or the representatives of the trustees alone are parties, the Court requires the *cestuis que trust* to be also represented, in order to secure the due application of the trust property.



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The Plaintiff amended his claim, by making all the survivors of the trustees of the three deeds (except *Stockdale*, who was a co-plaintiff) co-plaintiffs.

On the 17th of *January*, 1852, the *Master of the Rolls* again allowed an objection for want of parties, being of opinion that Mr. *Hobson*, notwithstanding a decree in the present suit, might be liable to account again, at the suit of any person beneficially interested and not being a party to the present suit.

The Plaintiff again amended and added five other subscribers as co-plaintiffs, and the Plaintiffs now sued "on behalf of themselves and all subscribers to the Society, except the Defendant *Stockdale*." *Hobson* and *Stockdale* remained throughout the only Defendants.

The 15 & 16 Vict. c. 86, s. 42, Rule 9, had lately come into operation, which provides, that in all suits concerning real or personal estate vested in trustees, such trustees shall represent the *cestuis que trust* "in the same manner and to the same extent" as executors represent them in personal estate; and that it shall not be necessary to make the *cestuis que trust* parties to the suit; but the Court may, "if it shall so think fit, order such persons or any of them to be parties."

The cause again came on for hearing.

Mr. *R. Palmer* and Mr. *Humphreys*, for the Defendants,

(a) 12 *Beav.* 190 and 15 *Beav.* 49, and see *Lowe v. Morgan*, 1 *B. C. C.* 368; *Calverley v. Phelps*, 6 *Madd.* 229; *Osbourn v. Falls*, 1 *Russ. & Myl.* 741.

ants, again objected, that all the subscribers ought to be made parties.

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Mr. Osborn, for the Plaintiffs, contended, that this had never been held necessary; and at all events, that the act above referred to had removed the objection.

*The MASTER of the ROLLS.*

I think the ninth rule of the statute cures the objection, and I will state why I think it applies to the present case. It is important to distinguish between the trustees in whom the estate is vested, and the trustees of the society. There are certain persons in whom the estate is vested for the benefit of the other persons; and the rule says, that in all suits concerning real and personal estate, the trustees shall represent the *cestuis que trust*, to the same extent as executors do in the case of personal estate. Here a mortgage is executed in 1824, in which six persons are mortgagors, and the estate was to be reconveyed by the mortgagee to those six persons who conveyed the estate to him, as soon as he had been fully paid everything he is entitled to.

When the cause came before me, before the statute, I thought that if the survivors alone filed a bill, they could not maintain it,—for this reason, because any *cestui que trust* might afterwards file a bill, and would not be bound by the accounts taken in such a suit, I therefore thought, that the Plaintiff was entitled to have them represented. But the act now says, that they shall be bound, and prevented opening the accounts. If the Court held this to be so, this would be all that could be required for the protection of the mortgagee;

1852.  
  
STANSFIELD  
v.  
HOBSON.

gagee; and I conceive that the present objection is met by showing that the mortgagee would now be protected.

But the Legislature foresaw that the representative of a deceased trustee might file a bill to redeem; and though the rule would protect the mortgagee, yet such representative might put the money produced by the suit into his own pocket. It therefore provided, that the Court, if it should think fit, might order other persons to be made parties.

If this case had come on upon a bill filed by the surviving mortgagors alone, I should have thought it proper to have the *cestuis que trust* represented, so as to have not only the trustees but *cestuis que trust*, who would sufficiently represent the society present, for the purpose of taking the accounts and for assuring me that the produce would not be misapplied.

I think I have here a sufficient number of persons to represent the society. Though there may be other persons interested, I think the mortgagee will be sufficiently protected, and the society also.

Over-rule the objection for want of parties.

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1852.

## PERKINS v. EDE.

Nov. 9.

SOME property, consisting of a residence and about four acres, was sold in the suit to Mr. *Forbes*. The question was, whether a good title could be made. It appeared, that part of the property consisted of a slip of ground between the house and public highway, which the vendors claimed as part of an allotment under an inclosure. This they failed in establishing.

A residence, with four acres, was sold. It turned out, that there was no title to a slip of ground of about a quarter of an acre, between the house and the high road. Held, that it was not a proper subject for compensation, and that a good title could not be made.

Mr. *Roupell*, Mr. *Shebbeare* and Mr. *Rudall*, for the vendors, argued, first, that it was part of the inclosure; secondly, that adverse possession bound the lord, *Creach v. Wilmot* (a); *Doe d. Watt v. Morris* (b); and thirdly, that, even if the title were bad, as regarded the small slip of land, it was a matter of compensation, and not a ground for rescinding the contract.

Mr. *R. Palmer*, Mr. *Lewis* and Mr. *Forbes*, for the purchaser.

They cited *Edwards v. M'Leay* (c).

## The MASTER of the ROLLS.

I think it clear, that the strip of land, consisting of thirty-eight poles, is not included in the award. It is argued, that twenty years' possession gives a sufficient title; but *Edwards v. M'Leay* decided the contrary, and

(a) 2 Taunt. 160.

(b) 2 Scott, 276.

(c) Sir Geo. Cooper, 308.

## CASES IN CHANCERY.

and here there is evidence that the door, which separated it from the road, was bricked up within that time.

Under ordinary circumstances, this would be a case for compensation; but here is a house with a long strip of land between it and the road, to which there is no title, so that the people, in passing, can look in at the window. This is not a case for compensation.

### LORD KENSINGTON v. BOUVERIE.

Nov. 9.  
being tenant for life of estate, and owner of charge of 20,000l. thereon, mortgaged the 20,000l. to B. for 14,000l. he afterwards mortgaged it and other property to C. for 24,000l. he died, and the succeeding tenant for life paid a redemption against C. on payment of a sum as due on account of the 20,000l. (thus leaving the charge of 20,000l. into two portions). He died, that both he and the executors of his estate were necessary parties to the suit.

THE bill stated, in effect, that by a settlement made in 1833, the *Kensington* estates were settled on the late Lord *Kensington* for life, with remainder to the Plaintiff for life, with remainder to his first and other sons in tail, with ultimate remainder to the late Lord in fee. And a power was thereby given to the late Lord *Kensington* to charge the estates with 20,000l. for his own benefit.

In 1835, he charged the estates accordingly, and created a term to secure it. He afterwards mortgaged this charge to Lord *Braybrooke* and others to secure 14,277l. 6s. 2d.

On the 27th of *January*, 1842, the late Lord *Kensington* assigned the 20,000l. (subject to the principal sum of 14,277l. 6s. 2d.) and his reversion in fee, to the Defendants *Bouverie*, to secure 24,500l.

The late Lord died in 1852, and the Plaintiff, being tenant for life, subject to the charge of 20,000l., filed this bill against the *Bouveries* and the first tenant in tail, and thereby splitting the charge of 20,000l. into two of 14,277l. 6s. 2d. and 5,722l. 13s. 10d., he sought to

to redeem the *Bouveries* alone, in respect of the alleged sum of 5,722*l.* 13*s.* 10*d.* The bill prayed a declaration, that the Plaintiff was entitled to redeem the *Bouveries*, upon payment to them "of such a sum of money (if any) as was due and owing to them, on account of the said sum of 5,722*l.* 13*s.* 10*d.* and interest, and offering to pay such amount, and it prayed an account and upon payment for a reconveyance.

1852.  
~  
LORD  
KENSINGTON  
v.  
BOUVERIE.

To this bill Messrs. *Bouverie* demurred for want of equity.

Mr. *Willcock* and Mr. *Tennant*, in support of the demurrer. The only equity to which the Plaintiff is entitled is, to pay off the charge of 20,000*l.* and interest to the executors of the late lord or to his incumbancers. The portion of the 20,000*l.* to which the Defendants are entitled cannot be ascertained in the absence of Lord *Braybrooke*, whom the Defendants have a right to redeem, nor can any relief be granted in the absence of the representatives of the late Lord *Kensington*, the mortgagor. The Plaintiff does not ask to redeem the Defendants altogether, by payment of 24,500*l.*, or to deal with the reversion in fee, which is mortgaged to them, but only to pay the amount due to the Defendants, after satisfying Lord *Braybrooke* in respect of the 20,000*l.* Lord *Braybrooke* may have been wholly or partially paid off, and the amount coming to the Defendants would thereby be increased. How can that fact be ascertained in the absence of Lord *Braybrooke*?

Mr. *R. Palmer* and Mr. *Selwyn*, in support of the bill. The Defendants are only entitled to the difference between 14,277*l.* 6*s.* 2*d.* and 20,000*l.*, which is all that was assigned to them.

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 LORD  
 KENSINGTON  
 v.  
 BOUVERIE.

At the hearing, proper accounts will be directed for the purpose of ascertaining what is due to the Defendants, and the Court will take care that they obtain everything they may be entitled to; but they have no right to involve prior incumbrancers, who are not desirous of being paid off, in the present litigation. It is immaterial what may be due to Lord *Braybrooke*, if the Defendants are paid everything which is due to them out of the settled estates. This the Plaintiff is willing to pay. It has been long settled, that a prior mortgage is not a necessary party to a suit to redeem a subsequent one.

*The MASTER of the ROLLS.*

I think the Plaintiff cannot proceed in this suit without bringing some other parties before the Court. If in this case the Plaintiff were willing to redeem, by payment of 24,500*l.*, I should have no hesitation in saying, that it was not necessary for him to make the prior incumbrancers parties; but here the Plaintiff asks to redeem the Defendants on payment of so much of a charge on the estate as they may be properly entitled to. This amount must be ascertained, and I am of opinion that it cannot be ascertained in the absence of parties interested in what the amount may be. The Plaintiff would be entitled to redeem, on payment of so much of the 20,000*l.* as remains, after satisfying the 14,277*l.* 6*s.* 2*d.* to Lord *Braybrooke* and others. It is possible that the late Lord *Kensington*, who was the owner of the charge and the mortgagor, may have paid off a part of the charge, and his legal personal representatives would be interested in ascertaining the amount. I think that the Defendants are entitled to have the amount ascertained before they can be called on to accept any sum of money, and I think it can only be  
 ascertained

ascertained in the presence of Lord *Braybrooke* and the representatives of the late Lord *Kensington*.

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BOUVERIE.

I shall allow the demurrer, with leave to amend.

MORRELL v. WOOTTEN.

Nov. 9.

An order was made by the Vice-Chancellor in 1846, in a suit of *Parker v. Morrell*, by which *Morrell* was ordered to pay *Parker* a sum of 2,024*l.* 16*s.* 6*d.* *Morrell* immediately appealed from the order.

Where *A.*, having money in the hands of *B.*, directs a payment generally to *C.*, and *B.* consents, *C.* may enforce payment against *B.*; but it is necessary that *A.*'s order should be communicated to *C.*

By a memorandum of agreement of the 23d of July, 1847, and made between Messrs. *Wootten* (*Parker*'s bankers) of the one part, and *Parker* of the other part, after reciting the order of the Vice-Chancellor, the pending appeal in *Parker v. Morrell*, and that Messrs. *Wootten* had "lately applied to *Parker* and requested him to enforce payment of the 2,024*l.* 16*s.* 6*d.*," and to pay 2,000*l.*, part thereof, into the bank to his account,

Where *A.*, having money in the hands of *B.*, directs him to pay a sum and out of that particular fund

to *C.*, this amounts to an equitable assignment, and the assent of *B.* is unnecessary to give it validity.

By an order in a suit, *A.* was ordered to pay a sum to *B.* After *A.* had appealed, *B.*'s bankers induced *B.* to enforce the order and pay the amount to his account, the bankers undertaking to repay it, if, on the appeal, *B.* should be ordered to repay it. The order was reversed, and *B.* directed his bankers to pay the amount to *A.*, but the direction was not communicated to *A.* The bankers had also said, they were quite ready to pay the money to *A.*, and *B.* had said, "there it is for you," viz. at the bank. *B.* became bankrupt. Held, that neither the agreement, nor the order, nor the statements so made, gave to *B.* any claim upon the fund in the hands of the bankers.

DATES.

|                |                                           |                 |                                     |
|----------------|-------------------------------------------|-----------------|-------------------------------------|
| 1846.          | Order to pay <i>P.</i>                    | 1848. Feb. 18.  | <i>P.</i> 's order to pay <i>M.</i> |
| 1847. July 23. | Agreement between <i>P.</i> and <i>W.</i> | 1848. Feb. 22.  | Conversation.                       |
| 1848. Jan. 27. | Order reversed.                           | 1848. Feb. 25.  | Do.                                 |
|                |                                           | 1848. March 10. | Bankruptcy.                         |



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and that *Morrell* had paid to *Parker* the said sum ; and reciting that if the judgment should be reversed, *Parker* would be ordered to repay that sum to *Morrell*, and that it was the intention of the parties, that the 2,000*l.* agreed to be paid into the bank “ should, at all times thereafter, be held by Messrs. *Wootten* ready to be paid to *Parker*, to enable him, at any time, in the event of the judgment upon the appeal being in favour of *Morrell*,” and his being ordered to repay the money, “ to comply with such order ;” Messrs. *Wootten* thereby agreed with *Parker*, that they, in the above event, would, upon demand in writing of *Parker*, pay “ to *Parker*, his executors or administrators,” the “ full sum of 2,000*l.* sterling.” And it was agreed, that Messrs. *Wootten* should not be entitled to set off the 2,000*l.* against any debt due from *Parker* to them, it being the express intention of the parties that *Parker* should, in the above event, “ be absolutely entitled to be paid the said sum of 2,000*l.* sterling, without regard to any set-off or cross claim.”

On the 27th of *January*, 1848, the order of the Vice-Chancellor was reversed, and *Parker* was ordered to repay the 2,024*l.* 16*s.* 6*d.* to *Morrell*. *Morrell* applied to Messrs. *Wootten* for the money, and some negociation took place between the parties. It appeared, that on the 22nd of *February*, 1848, Messrs. *Wootten* had stated that they “ were quite prepared to pay, not only the 2,000*l.* originally deposited, but also 81*l.* which *Parker* had since brought them,” to *Morrell*, and that *Parker* had said, on the 25th of *February*, 1848, to *Morrell's* solicitor, “ Well, have you got the money” (meaning the 2,000*l.*) The solicitor said, “ No, we have not.” He said, “ There it is for you, if you like to have it,” (meaning at Messrs. *Wootten's*).

Discussions

Discussions then took place as to the indemnity to be given to Messrs. *Wootten* by *Morrell*; but on the 10th of *March*, 1848, and before the money had been paid over, *Parker* became bankrupt. *Morrell*, after failing to recover the money in an action at law, filed this bill against Messrs. *Wootten* and the assignees of *Parker*, to recover the 2,081*l.*

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By the answer, it for the first time appeared, that *Parker*, on the 18th of *February*, 1848, had signed the following memorandum at the foot of the agreement of the 23rd of *July*, 1847 :—The “ judgment on the appeal referred to by the foregoing agreement having been given in favour of Messrs. *Morrell*, I authorize and request you to pay over to them the sum of 2,000*l.*, mentioned in the said agreement, and I declare that their receipt shall be to you a sufficient discharge.” This was addressed to Messrs. *Wootten*, and it was communicated to Messrs. *Wootten*, but not to Messrs. *Morrell*, and the first time the latter knew of its existence was on the answer coming in in the present suit.

The cause now came on for hearing.

Mr. *Roupell* and Mr. *Shebbeare*, for the Plaintiff. Messrs. *Wootten* are trustees of the fund for the Plaintiff. First, the fund might be followed, for it was ear-marked, and was paid under the exigency of an order of Court, which was reversed by a subsequent order, directing its restitution, and Messrs. *Wootten* having notice, were bound by the proceedings. Again, it was deposited with them on the terms of the agreement of the 23rd of *July*, 1847, by which they engaged to hold it for the Plaintiff in a given event, which has happened. Secondly, the fund has been equitably assigned and appropriated to the Plaintiff; for there was the order of *Parker* of the 18th



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18th of *February*, 1848, to pay it to the Plaintiff, which he could not recall after a third party had acquired an interest thereunder. This was followed by the offer of Messrs. *Wootten* of the 25th of *February*, 1848, to pay, and the subsequent appropriation by *Parker* of the 25th of *February*, 1848. This, according to the authorities, is a sufficient assignment in equity, though not at law.

*Row v. Dawson* (a); *Smith v. Everett* (b); *Ex parte South* (c); *Burn v. Carvalho* (d); *L' Estrange v. L' Estrange* (e); *Collyer v. Fallon* (f); *Story, Eq. Juris.* (g).

Mr. *R. Palmer* and Mr. *Giffard*, for Messrs. *Wootten*, and Mr. *Lloyd* and Mr. *H. Stevens*, for the assignees. The Plaintiff was no party to the agreement of the 23rd of *July*, 1847, and it was competent to the parties thereto either to revoke or vary it, without the assent of the Plaintiff, *Colyear v. The Countess of Mulgrave* (h). The object of that agreement was, not to provide for the Plaintiff, but to prevent the bankers obtaining a right of set-off against any debt due to them from *Parker*, and to secure a fund to enable him to comply with any order as to repayment, which the Court might make on the hearing of the appeal. Even if it were a distinct trust for the Plaintiff, still it might be revoked, the Plaintiff being a mere creditor and no party to the contract; *Wallwyn v. Coutts* (i); *Garrard v. Lord Lauderdale* (k); *Acton v. Woodgate* (l).

Secondly.—There is no equitable assignment. The order

- (a) 1 *Ves. sen.* 331.  
(b) 4 *B. C. C.* 64.  
(c) 3 *Swan.* 392.  
(d) 4 *Myl. & Cr.* 702.  
(e) 13 *Beav.* 281.  
(f) *Turn. & R.* 459.

- (g) Vol. 2, p. 276.  
(h) 2 *Keen*, 81.  
(i) 3 *Mer.* 707.  
(k) 3 *Sim.* 1.  
(l) 2 *Myl. & K.* 492.

order of the 18th of *February* was never communicated to the Plaintiff, who discovered it after the bankruptcy and the institution of the suit, and it was introduced into the bill by amendment. This order was never accepted by Messrs. *Wootten* or acted on by them, and was revocable and has been legally revoked; *Gibson v. Minet* (a). They also cited *Rodick v. Gandell* (b).

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 v.  
 WOOTTEN.

*The MASTER of the ROLLS.*

I am of opinion that the Plaintiff has failed in all the points. The first question is, whether this agreement of the 25th of *July*, 1847, creates any trust of which *Morrell* can claim the benefit, and I am of opinion it does not. It is true that it recites the proceedings in *Chancery*, and that Messrs. *Wootten* had requested *Parker* to enforce the payment, and pay the sum of 2,000*l.* into their bank to his account. [*His Honor stated the general effect of this agreement.*]

In the first place, it is to be observed, that this actual money was not required to be set apart, as contended by the Plaintiff to be the true construction of the deed. It was to be placed to *Parker's* account, and in case he should be called on to repay the sum of 2,024*l.* 16*s.* 6*d.* to the Plaintiff, the Messrs. *Wootten* agreed to pay to *Parker* the sum of 2,000*l.* sterling, that is, out of any monies they thought fit. It is obvious that this was a trust for *Parker* alone, and none whatever for *Morrell*. The recital as to the interest of *Morrell* is merely introduced for the purpose of explaining why *Parker* might require the return of the money, and why a special provision was made. *Parker* "says there are circumstances which may make it necessary for me to restore this money,

(a) 2 Bing. 7. (b) 12 Beav. 325 and 1 De G. M. & G. 763.

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money, and for that reason, if my account should be overdrawn, you must enter into an agreement or condition to repay it, if it should be wanted for that purpose."

If Messrs. *Wootten* had repaid it to *Parker*, and he had put it into his own pocket, no one could contend that Messrs. *Wootten* or *Parker* had been guilty of a breach of trust. I am therefore of opinion that the agreement creates no trust in favour of the Plaintiff, but only in favour of *Parker*, and that the recital was only for the purpose of explaining why a trust was created in his favour. I think that *Parker* had power of disposing of this sum, and that if it had been paid to him, the Defendants would not have been liable for a breach of trust.

Is there any identity of the fund? In all cases where money has been followed, there has been an actual identity, and it has been traced like a specific chattel. In *Small v. Attwood(a)*, that occurred: the bank notes were traced into stock, and the Plaintiff came and attached that particular stock. Here there is nothing to show that the obligation is to repay any particular sum of 2,000*l.* I thought at first there might be some equity, but, on examination, I think there is not.

Next, is there any obligation on the part of Messrs. *Wootten* to pay the Plaintiff, or is there any equitable assignment to him. This is put on the document of the 18th *February* and the other circumstances. There are two classes of cases; the first, where a person having money in the hands of another, directs him to pay it to a third party. In that case, if the holder or deposittee consents so to do, and the direction is communicated to

(a) *Younge*, 507.

to the third person, the thing is complete, and the payee can enforce the payment of the money; but it is absolutely necessary that the order should be communicated to the intended payee. The other class of cases is distinct, and is rather an assignment, as where one man gives to another an order to receive a sum out of a particular fund due to him in the hands of a third party. In that case the consent of the deposittee to pay is by no means necessary. This is settled by the cases of *Row v. Dawson*(a) and *Ex parte South*(b), and other cases.

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 v.  
 WOOTTEN.

The person entitled to the money gives the order, which, being communicated to the deposittee, becomes a perfect equitable assignment of so much money in his hands as is expressed in the order. Neither of these cases apply to the present. There was an order of the 18th *February*, by which *Parker* authorized and requested Messrs. *Wootten* to pay the sum of 2,000*l.* to the Plaintiff; but it does not appear that *Parker* or Messrs. *Wootten* communicated it to the Plaintiff; on the contrary, it appears, that at the time of filing the bill, the Plaintiff was ignorant of the fact, and discovered it only from the answer, and he then introduced it by amendment.

It is argued that this is sufficient, for after the order was given Messrs. *Wootten* said, "that they were willing to pay the money over." This does not appear to me to bring it within the first class of cases; and it is manifest that it does not come within the second class. The casual conversation in *Oxford*, whether they had money ready or not, does not appear to me to be any appropriation; and I think that no case can be cited, and no reasonable ground advanced, on which it can be argued to be so.

If

(a) 1 *Ves. sen.* 331.

(b) 3 *Swanst.* 392.

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 v.  
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If so, there is nothing more in the case than this:—  
 an order given by a man to a banker to pay over a  
 sum to a third person, the banker does not do it, and  
 the order is countermanded. Can the third party insist  
 on the banker paying him the money?

I am of opinion that this was a mere naked authority  
 to pay, which *Parker* had the power of revoking if he  
 thought fit—he did revoke it on the 3rd of *March*; and  
 this fund therefore forms general assets to be distributed  
 amongst *Parker's* creditors. The bill must be dismissed;  
 and the Plaintiff must pay the costs.

#### DUNCAN v. WATTS.

Nov. 10.  
 A bequest of  
 an annuity to  
 an executor,  
 for his trouble  
 in the conduct  
 and manage-  
 ment of the  
 testator's  
 affairs, has no  
 priority over  
 other legacies,  
 in case of a  
 deficiency, and  
 it must abate.

THE testator, who had *Jamaica* estates, by his will  
 bequeathed as follows:—

“As my acting executor and trustee in *England* will  
 have considerable trouble in the conduct and manage-  
 ment of the affairs of my estate in this country, for  
 which he would otherwise have no legal claim to com-  
 pensation, I give and bequeath to such one of my exe-  
 cutors of the trust of this my will in *England*, so long  
 as he shall act therein, one annuity or yearly sum of  
 100*l.* of lawful money of *Great Britain*, to be paid half-  
 yearly, the first payment to be made at the end of six  
 months after my decease.”

There being a deficiency for the payment of all the  
 legacies,—

Mr.

**MR. R. Palmer** and **Mr. E. F. Smith** argued, that the legacy to the executor had priority and was not liable to a **bate**, for it was given for the purchase of his future services, to be rendered to the testator's estate.

1852.

**DUNCAN**  
**v.**  
**WATTS.**

**MR. Martindale**, *contra*, cited *The Attorney General v. Robins (a)*.

*The MASTER of the ROLLS.*

**You** need not argue that point. I cannot accede to the claim of the executor.

(a) 2 P. Wms. 25.

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**NOTE.**—See *Burridge v. Bradyl*, 1 P. W. 127; *Blower v. Morret*, 2 Ves. sen. 420; *Davenhill v. Fletcher*, 1 Amb. 244; *Heath v. Dendy*, 1 Russ. 543; *Eland v. Eland*, 1 Beav. 246; *Accey v. Simpson*, 5 Beav. 35; *Davie v. Bush*, *Younge*, 342; *Norcott v. Gordon*, 14 Sim. 261; *Brown v. Brown*, 1 Keen, 275; and *Pugh v. King*, MS. before V. C. *Kindersley*, 1851.

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# **BARTON v. WHITCOMBE.**

**THE** Plaintiff and Defendant, who were co-partners, had entered into a speculation in shares, and a loss of 3,000*l.* had occurred, the whole of which the Plaintiff had paid, although the Defendant was liable for one-half.

The Defendant, who had previously been very irregular in attending business, called on the Plaintiff on the 17th of *December*, 1851, and said he was about to try a change for the benefit of his health. He sold the furniture of his house, went away, abandoning his wife, and was not afterwards heard of.

*Nov.* 10.

A defendant who had absconded "to avoid service of any legal process," held to be within the 31st Order of May, 1845, and service of process by notice in the *London Gazette* was directed.

The Plaintiff filed this bill to wind-up the partnership,  
and



1852.  
 ~~~~~  
 BARTON
 v.
 WHITCOMBE.

and being unable to find the Defendant to serve him with process, he now applied, under the 31st order of the 8th of *May*, 1845 (*a*), for an order that the Defendant might appear within a time to be fixed by the Court and to be inserted in the *Gazette*.

In his affidavit in support, the Plaintiff stated as follows:—"I say, that under the circumstances aforesaid, I verily believe that the Defendant absconded on the 17th of *December*, 1851, with a view to escape the liabilities to which he was and still is subject as herein-before mentioned, *and to avoid service of any legal process* which might be issued against him."

Mr. *Renshaw*, in support of the application, referred to *Cope v. Russell* (*b*), and submitted, that it was not necessary for the Plaintiff to show that the Defendant had absconded to avoid process in this particular suit.

The MASTER of the ROLLS made the order.

- (*a*) *Ordines Cancellariæ*, 295.
 (*b*) 2 *Phillips*, 404.

NOTE.—A difficulty afterwards arose, as to the mode in which the Plaintiff should serve the Defendant with notice of having filed a replication, under the 15 & 16 *Vict.* c. 86, s. 26, and the 23rd Order of 26th *Oct.* 1842 (*Ord. Can.* 216), and 28th General Order of 7th *Aug.* 1852 (*Ord. Can.* 468). The Lord Chancellor and Lords Justices directed, that the notice of service should be inserted in the *Gazette*, and in two local papers (*Jan.* 15, 1853).

1852.

SANDERS v. RODWAY.

IN 1828, the Defendant *John Rodway* married *Elizabeth Sanders*.

Nov. 11.

Courts of Equity, recognizing the validity of separation deeds, will enforce them.

Differences having arisen, they, in 1834, agreed to separate, whereupon a deed, dated the 19th of February, 1834, was executed, which was made between the Defendant *John Rodway* of the one part, and *Benjamin Sanders* the elder (the father of Mrs. *Rodway*) and *Benjamin Sanders* the younger (her brother) and Mrs. *Rodway* of the other part, whereby, after reciting the existing differences and the agreement to separate upon the terms after mentioned, *John Rodway* covenanted with *Benjamin Sanders* the elder and *Benjamin Sanders* the younger, their executors, administrators and assigns, that he *John Rodway* would permit and suffer *Elizabeth Rodway*, from time to time and at all times from thenceforth, during her natural life, to live separate and apart from him, and to reside and be in such place and places, and family and families, and with such relations and friends and other persons, and to follow and carry on such trade or business as she from time to time, at her will and pleasure, notwithstanding her present coverture and as if she were a feme sole and unmarried, should think fit; and that he *John Rodway* would not, at any time or times thereafter, sue her, the said *Elizabeth Rodway*, in the Ecclesiastical Court or any other Court for living separate or apart from him, or to compel her to cohabit with him, or sue, molest, disturb or trouble her for such living separate and apart from him, or any other person or persons whomsoever, for receiving, harbouring

By a separation deed, a husband covenanted with his wife's father, that his wife, during her life, might live separate from him, that he would not sue her in the Ecclesiastical Court for living separate; that he would not molest, &c. her, nor claim any of her property; and her father covenanted with the husband to maintain her and indemnify him. Upon an infraction of the covenant, by the husband molesting his wife, he was restrained by injunction.

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bouring or entertaining her ; nor would, without her consent, visit her, or knowingly come into any house or place where she might dwell, reside or be, or send or cause to be sent any letter or message to her. He then covenanted not to claim or interfere with her present or any future acquired property.

And *Benjamin Sanders* the elder thereby for himself, his Heirs, executors and administrators, covenanted with *John Rodway*, that he *Benjamin Sanders* would, during the remainder of her life, clothe, maintain and keep *Elizabeth Rodway*, and would indemnify *John Rodway* from all debts which she might, at any time thereafter, contract or incur ; and that he *Benjamin Sanders* would not thereafter (but subject nevertheless and without prejudice to the proviso thereafter contained) sue, arrest or prosecute *John Rodway* or require from him a debt of 300*l.* owing to him. And *Elizabeth Rodway* thereby agreed that she would not, at any time thereafter, claim or demand dower, freebench or thirds, and would release her right thereto, in manner therein mentioned.

Benjamin Sanders the elder survived his son, and died in *March*, 1852, having, by his will, bequeathed a considerable sum of money in trust for the separate use of Mrs. *Rodway*. After her father's death Mrs. *Rodway* resided with her brother.

The Defendant, who had hitherto adhered to the stipulations contained in the separation deed, had lately, with a view of making better terms for himself, insisted, that the deed of separation was invalid, and on his right to the possession of his wife. He had called at the house where she was residing, and required to see her.

A meeting took place between the Defendant *John Rodway*

Rodway and the solicitor of Mrs. *Rodway* and her brother, which was detailed in the affidavit. At the meeting *John Rodway* expressed himself as follows:—"I hope and trust I shall not commit any crime or sin; I have not committed, and do not intend to commit, any breach of the peace, but I will have my end, and the magistrates have no jurisdiction, at least it is very doubtful. I am a most desperate and determined man, and come what will, at any risk, I will have my end. I know that I have infringed upon the deed of separation by calling at the cottage (meaning where *Elizabeth Rodway* was residing); but it is my determination to get possession of Mrs. *Rodway*, and I will follow her wherever she goes, and, if I cannot do so without, I will advertize in the public newspapers. I am determined in the course I shall pursue; I have been endeavouring to take apartments in *Bromsgrove* (where she resided), but I have not succeeded; I shall leave *Gloucester* entirely, and come to live at *Bromsgrove*, and I will take every opportunity possible of seeking for and finding and taking Mrs. *Rodway*. I know I am about to take a desperate step, and that I stand on the brink of a precipice, but nevertheless I am determined. This is not a mere threat I assure you, I am determined to do it." He added, that he meant to use every means in his power to get possession of Mrs. *Rodway*.

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A bill was filed by Mrs. *Rodway* and her brothers (who were the executors of her father), praying simply an injunction to restrain the Defendant *John Rodway* from compelling *Elizabeth Rodway* to cohabit with him, and from molesting, disturbing or troubling her for living separate and apart from him; and also from molesting, disturbing or troubling any other person or persons whomsoever, for receiving, harbouring or entertaining her; and from (without her consent) visiting her,

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or knowingly going into any house or place where she might dwell; or sending any letter or message to her; and from endeavouring or making any attempt to get possession of her person; and from in any manner molesting or annoying her.

A motion was now made for an injunction in the terms of the prayer of the bill.

Mr. *R. Palmer* and Mr. *Renshaw*, in support of the motion, argued, that the deed being for valuable consideration and valid, the Court would restrain its violation by the Defendant. They cited *Jones v. Waite*(a), *Wilson v. Wilson*(b), and *Lumley v. Wagner*(c).

Mr. *Rogers*, *contra*, argued, that the covenants were contrary to the policy of the law and to morality, and such as this Court had never been in the habit of enforcing, and that the Plaintiffs ought to be left to their legal rights. That this Court would interfere, as to the rights of property, as between husband and wife, but not in questions relating to the restitution of conjugal rights.

The MASTER of the ROLLS (without hearing a reply).

I think this a case in which the Plaintiffs are entitled to an injunction in the terms of the deed. It is perfectly true (as Mr. *Rogers* observed) that this Court does not interfere with any question respecting the restitution of conjugal rights, and leaves such questions entirely to the Ecclesiastical Court; but this Court deals with covenants which parties enter into; and if a person chooses to enter into a covenant restraining himself from

(a) 9 Cl. & Fin. 101.

(b) 14 Sim. 405, and 1 H. L.

Cas. 538.

(c) 1 De G., M. & G. 604.

from proceeding in a matter in respect of which this Court may not have jurisdiction, yet having jurisdiction in matters of contract, the Court will restrain him from violating his covenant. All that I have, therefore, to consider is, whether this is a valid deed, and executed by the husband, and if so, whether he has done acts in violation of it. If he disputes the validity of the deed, he may institute any suit he may think fit in this Court to set it aside: but this Court has undoubtedly, in a great number of cases, held, that deeds of separation entered into between the husband and wife, with the interposition of trustees, who covenant to indemnify the husband against his wife's debts, are such as it will enforce. The cases are numerous on the point.

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I am of opinion that this is a deed of that description, and that the Court will accordingly execute and enforce the trusts contained in it, so long as it stands; that is, until it shall have been set aside by some decree of this Court made in a suit properly instituted for that purpose.

The question here, is not whether the husband or wife are persons of respectability, but whether the parties have entered into a legal deed which binds them to certain acts, the violation of the covenants contained in which this Court will prevent. I am of opinion that this Defendant has covenanted not to molest the wife, and not to interfere with her in the manner in which he is now doing; and I am of opinion, therefore, that I must restrain him from taking that course.

It appears to me, that the bill ought properly to seek the execution of the trusts of the deed, and the performance of the covenants, one of which, on the part of the husband,

1852. husband, is, not to do those acts which by the affidavit it appears he is now doing.


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The bill ought also to state that this is not a covenant which expired with the death of the father of the lady. By the deed it appears to be a covenant which binds his heirs and executors. Treating it, as I think I am entitled to do, as a bill for the execution of the trusts and the performance of the covenants of the deed, and being of opinion that the husband has violated them, I must restrain him from so doing, and there must therefore be an injunction in the terms of the deed.

NOTE.—See also *Worrall v. Jacob*, 3 Mer. 256; *Frampton v. Frampton*, 4 Beav. 287; *Wurrender v. Wurrender*, 2 Cl. & Fin. 488.

RHODES v. BUCKLAND.

Nov. 12.

A puisné incumbrancer offered to pay off the first mortgage, which, being declined, he filed a bill to compel a transfer. The first mortgagee having afterwards proceeded to sell the property, was restrained from transferring the first mortgage and parting with the legal estate and title deeds.

IN 1826, 1827 and 1828, Mr. *Trevanion*, by four several deeds, mortgaged part of his Cornwall estates to Messrs. *Coodé* and Mr. *Bolitho* respectively. The first mortgage deed contained a power of sale.

Mr. *Trevanion* afterwards executed a great number of incumbrances and entered into subsequent dealings in respect of the whole estate, which were of a very complicated nature. It is sufficient, however, for the present purpose, to state, that the Plaintiff was a mortgagee of the whole of the estates, subject to the mortgages of 1826, 1827 and 1828, or part of them.

The Defendants, *Buckland*, *Cockell* and *Faris*, recently obtained transfers to them of *Coodé's* and *Bolitho's* mortgages; and on the 20th of *February*, 1852, the Plaintiff,

Plaintiff, Mrs. *Rhodes*, gave notice to them that she **was** the next incumbrancer, that she would pay off the **amount** of their mortgages at the end of six months, **and** warning them not to deal with the mortgages or **the** property, she being even then willing to pay them off.

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On the 13th of *August*, just previous to the expiration of the six months, she requested to be informed of **the** amount claimed to be due, and to appoint a time **and** place to redeem and arrange as to the settlement of **the** transfers.

On the 17th of *May*, 1852, the solicitors of the three **Defendants** answered, "We have received notice from **Mr. Ivimy** of his prior right to redeem ; and our clients, **being** contented with the securities they hold, have instructed us to decline receiving their principal money **and** interest from the parties mentioned in your notice."

On the 28th of *August*, the Plaintiff, Mrs. *Rhodes*, **filed** her bill against the three **Defendants** and others (omitting, however, Mr. *Trevanion*), and after stating **the** above circumstances and her desire to get in the **prior** incumbrances to enable her to exercise her own **power** of sale over the property, prayed a declaration, **that** upon payment of the sums aforesaid, she was entitled to assignments of *Coode's* and *Bolitho's* mortgages, and to have the legal estate conveyed to her, and **for** an injunction as after stated.

After this, on the 7th of *October*, 1852, the Plaintiff **received** notice from the three **Defendants** that they **had** contracted to sell the property to Mr. *H. C. T.* **On** the same day, the Plaintiff required the **Defendants** **to** give an undertaking not to deal with the securities or **the**

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the legal estate, except under the order of the Court. This the Defendants declined to give.

It was now moved, on behalf of the Plaintiff, as follows:—That upon payment by the Plaintiff to the Defendants, *Buckland, Cockell and Faris*, of what was claimed by them to be due, in respect of all principal and interest now due and to become due at the time of such payment, upon the mortgage securities of 1826, 1827 and 1828; and also upon payment of whatever sum might be claimed to be due and owing to them, for interest in respect of costs, down to the filing the bill, or upon payment of the same into Court (in case the Defendants should persist in refusing or declining to receive the same from the Plaintiff, the Defendants might be ordered to transfer to the Plaintiff), or as she might direct or appoint, the legal estate in the hereditaments at the premises comprised in the said mortgage securities; that the Defendants, *Buckland, Cockell and Faris* might be restrained, until the hearing of this cause, by the order and injunction of this Court, from transferring or assigning the said mortgage securities or any part thereof, or from conveying away or otherwise dealing with the legal estate in the hereditaments comprised in the said mortgage securities, or parting with the title deeds relating thereto, except under the order of the Court.

Mr. *Willcock* and Mr. *Tennant*, in support of the motion, argued, that the Plaintiff being willing to pay everything due, the Defendants ought not to be allowed to defeat her right pending the litigation. They cited a MS. case of *Jeffereys v. Spret*, where an injunction had been granted against a mortgagee on payment of the amount due. They offered to take an immediate reference.

reference to ascertain the amount due to the Defendants.

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Mr. *R. Palmer*, Mr. *Erskine*, Mr. *Shapter* and Mr. *G. L. Russell*, for other parties.

Mr. *Lloyd* and Mr. *J. V. Prior*, for the three Defendants in whom the first mortgages were vested, and

Mr. *Roupell* and Mr. *Renshaw*, for trustees in the same interest. This is not a bill to redeem a prior mortgage and foreclose the equity of redemption, for the mortgagor is no party to the suit; and it has been settled that there can be no adverse redemption between the first and second mortgagees without bringing the mortgagor before the Court. This bill merely prays a declaration, that the Plaintiff is entitled to a transfer of the Defendants' mortgages. This she is clearly not entitled to, "for no mortgagee can be compelled to place another person in his stead as mortgagee," *James v. Bion* (a). Lord *Cottenham* held, that "the only relief to which a second mortgagee is entitled, is to a decree for the redemption of the first mortgage, and for the foreclosure or redemption of the mortgagor. He has no right to compel the first mortgagee to transfer to him his first mortgage, on payment of what is due, or to call on the mortgagor to join in such transfer, *Ramsbottom v. Wallis* (b). If the Defendants hold an advantageous security, there can be no reason why they should put the Plaintiff in their place. Thus, if the Defendants obtain five per cent. for their money, what right has the Plaintiff to deprive them of the benefit of it and compel them to take three per cent. in the funds. If the mortgage is to be kept on foot, the Defendants have the best title

(a) 3 *Swanst.* 241.

(b) *Coote on Mortgages, Appendix*, 704, 2nd ed.

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title to retain it, for the right to redemption is only ancillary to the working out the Plaintiff's remedy against the mortgagor, and with a view, by foreclosure, to become owner of the estate, *Ramsbottom v. Wallis* (a).

Again, the other incumbrancers may contest the Plaintiff's right to obtain the legal estate, and they are not present.

Secondly.—*Rhodes* has covenanted not to take any proceedings for a limited time, which has not yet expired (b), and therefore the Plaintiff is not entitled either to foreclose or redeem. A stranger to such a contract may take advantage of such a stipulation, for so long as the mortgagor cannot be foreclosed, the prior mortgage cannot be redeemed, *Ramsbottom v. Wallis* (a).

Thirdly.—As to the contract for sale, its validity cannot be contested in the absence of the purchaser, and the pendency of a suit will not deprive a mortgagee of any of his rights or prevent his exercising all his powers, *Cockell v. Bacon* (b). "It is extremely clear," said Lord *Eldon*, "that a mortgagee may retain possession of the estate until he is paid, and that no one has a right to make a tender of the money due, except the party entitled to the equity of redemption; against all other persons the estate is the property of the mortgagee," *James v. Biou* (c).

The Court cannot, on motion, grant the substantive relief claimed by the bill; that is a matter to be disposed of at the hearing, and on this motion, the Court ought not to prejudge the questions arising between the parties,

(a) *Coote*, 704, 2nd ed.

(b) See *Cockell v. Bacon*, ante,

158.

(c) 3 *Swanst.* 237.

ties, by granting, in effect, the whole relief claimed by the Plaintiff.

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The MASTER of the ROLLS (without hearing a reply).

If the Plaintiff will confine her application to the last branch of the notice of motion, I think she is entitled to it.

The question to be determined in this case is, whether the Plaintiff has a right to redeem. It has been remarked, as against the Plaintiff, that I cannot determine, in this stage of the cause, that she has a right to redeem, and that I cannot now give her the fruits of redemption, without determining that she has a right to redeem. Now, if I cannot determine the question in the Plaintiff's favour, neither can I determine it against her; and if I were to refuse to make an order, I should be now determining, that the Plaintiff will not be able to make out any right.

There are questions of considerable nicety, which may have to be determined as to the right to redeem; and I concur in this part of the Defendant's argument:— That if a Plaintiff comes forward, on a bill to redeem, and asks to restrain a transfer, he is bound to make out a *primâ facie* case, and cannot, as a stranger, say, "I am entitled to redeem, and restrain the transfer of the legal estate." That is all that is decided by *James v. Biou*, and to that extent I concur. But I am of opinion that the Plaintiff has made out a *primâ facie* case, and that she is an incumbrancer on the property, but in what rank, or who are the persons entitled to redeem or foreclose, I express no opinion. If I were to say, that pending the suit, the Defendants may sell the property under the power of sale, and make a conveyance and transfer

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transfer of the legal estate, I should, on this motion, be determining that the Plaintiff has no right; for if she went on and established her right to redeem, it would be impossible for her to obtain any benefit at the hearing, as the purchaser, under the execution of the power, would get a title to the estate. I am of opinion, that, under the circumstances of this case, the principle of protection of the property pending litigation ought to be applied, so as to induce me to restrain any dealing with the legal estate, until I can determine the rights. The argument of the Defendants has tended to the very same conclusion; for they say, that the Court cannot deal with the legal estate, until it sees who is entitled to it. In this I concur; but am I to allow the Defendants to do that which the Court itself will not do? I am of opinion I ought not, and that I ought to protect the property until it can be seen who is entitled to it.

There are various circumstances, in this case, which induce me to consider that I ought not to allow this dealing with the legal estate. In *February*, 1852, notice was given to the Defendants to redeem, and in *August*, when the notice was about expiring, the Plaintiff said, "I am ready to pay; let me know the amount due to you." The Defendants answer, "We do not wish to be paid off; we dispute your title to redeem." Thereupon the Plaintiff files her bill for redemption, and after that bill has been filed and process has been served, the Defendants enter into a contract for selling the estate, so as to defeat the whole object of the suit. The Plaintiff asks that, while the matter is in dispute and discussion, the Defendants may be prevented defeating the sole objects of her suit.

It is obvious, that if this be allowed, any first mortgagee, by collusion with the mortgagor (which I do not impute

impute in this case), might wholly defeat the rights and title of any *puisné* incumbrancer. I cannot, therefore, in this state of the case, refuse to protect the property until I see to whom it belongs.

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It is said, that this suit is so framed, that no decree could be made at the hearing; but it is obvious, that the form of the record might be amended, so as to bring all persons necessary to litigate the question before the Court, and then it would be determined as against all persons interested in it.

I am of opinion, that the Plaintiff is not entitled to any of the early portion of her motion; but that she is entitled to an order restraining the three Defendants from assigning the mortgages, and dealing with the legal estate, until the hearing or further order.

Mr. Willcock. Will the order extend to the delivery of the title deeds?

The MASTER of the ROLLS.

No; I cannot make any such order as to the title deeds. The mortgagee is entitled to them.

ABSTRACT OF ORDER.

Injunction against "transferring or assigning the mortgage securities," and from "conveying away or otherwise dealing with the legal estate, in the hereditaments comprised in the mortgage securities, or parting with the title deeds relating thereto," until the hearing of this cause, or the further order of this Court.

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*In re* MOYLAN.

Nov. 12.

A. B. took the benefit of the act (the 1 & 2 Vict. c. 110), but no judgment was entered up under the 87th section. Held, on his death, that a scheduled creditor had no remedy against his assets.

ON the 9th of *April*, 1833, *Denis Creagh Moylan* (deceased) became indebted on bond to *Thomas Fee* in 35*l.*

On the 1st of *October*, 1839, *Moylan* was discharged under the Insolvent Act, and the debt of *Fee* was comprised in the schedule. No judgment was ever entered up, under the warrant of attorney executed by *Moylan* on the occasion, pursuant to the 1 & 2 Vict. c. 110, s. 87. *Moylan* died in 1849, and an order having been made, under Sir *George Turner's* Act, for the administration of his estate, the Master admitted the claim of *Fee* for principal and interest upon the bond, as a liability certain against his estate. It was now moved, on behalf of his executrix, that the claim might be disallowed.

Mr. *R. Palmer* and Mr. *Tripp*, in support of the motion.—No judgment having been entered up, there was no possibility of reaching either the person or estate of the debtor, except under such a judgment, and none can be entered up after the debtor's death, *Hurden v. Forsyth*(*a*). Under the act, the old debt is cancelled(*b*), and a new obligation created by virtue of the judgment, if entered up. There is no remedy at law, and therefore none in equity. The Master relied on the cases of *Barton v. Tattersall*(*c*) and *Ward v. Painter*(*d*), but

(*a*) 1 Q. B. Rep. 177.

(*b*) Sect. 91.

(*c*) 1 Russ. & M. 237.

(*d*) 2 Beav. 85, and 5 Myl. & C. 298.

but they do not apply. This case is governed by *Thomas v. Pinnell* (a), where no judgment had been entered up.

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Mr. *Schwyn*, for the creditor. The court did not intend, in the case of *Thomas v. Pinnell* (a), to overrule the two prior decisions, one of which was affirmed by Lord *Cottenham*. In *Ward v. Painter* (b), Lord *Langdale* thus explained the law relating to the subject:—He said, “The acts for the relief of insolvent debtors were intended to relieve them from imprisonment, and were not intended to discharge their after-acquired estate.” “I think that a main feature of the act is, that the after-acquired assets are to be applied in discharge of the unpaid debts, the moral obligation for paying which remains the same.” He afterwards added, “The only part [of the act] to be referred to is that part which relates to the application of his assets after his death, and for which purpose it was intended to make available the judgment and recognizance; but if that remedy fails, the ordinary jurisdiction of the Court of Chancery, in affording a remedy where there is a right, is not ousted; and if the remedy in the other Court fails, can it be said that this Court will withhold relief?”

The debt is not discharged by the 75th and 91st sections. It still exists, and if the legal remedy intended by the statutes has failed, that is the very reason for a Court of Equity, in the administration of the assets, to provide for the payment of a just demand (c).

*The MASTER of the ROLLS.*

I think the Master has miscarried, and that the cases  
of

(a) 15 *Beav.* 148.

(b) 2 *Beav.* 93.

(c) *Jellis v. Mountford*, 4 *Barn.*

& *Ald.* 256; *Ex parte Barrington*, 2 *Mont. & Ayr.* 255; *Francis v. Dodsworth*, 4 *C. B.* 202.



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of *Ward v. Painter* and *Barton v. Tattersall* do not support his finding. The Insolvent Act must receive the same construction in equity as at law, and the 91st section appears to me to discharge the insolvent debtor and his estate from all suits and actions, except under the judgment. In *Ward v. Painter* and *Barton v. Tattersall* recognizances had been entered into according to the act applicable to those cases, and it is quite consistent with my decision in *Thomas v. Pinnell*, that there should be a remedy in those cases, and none in a case where no judgment has been entered up under the subsequent statutes.

I am of opinion that the right at law is gone, and by analogy the right in equity is lost. It is not necessary to determine whether the debt exists or not; it is sufficient to say, that all remedies are gone. *Thomas v. Pinnell* is consistent with *Ward v. Painter* and *Barton v. Tattersall*, and I proceed on the same principle, namely that the remedy depends on the provisions of the statute, which gives none except under a judgment to be entered up against the insolvent debtor.

In this case the claimant has no remedy, and the report of the Master must therefore be varied.

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BRASSEY v. CHALMERS.

Aug. 5.

Nov. 13.

THE first question arising on this special case was, whether the trustees of the will of *William Fairhurst* had authority to make a partition.

A power to trustees "to sell and dispose of" the testator's real estate and to give receipts, does not authorize a partition.


William Fairhurst was entitled to one undivided sixth part of a freehold estate which had been purchased by three other persons in 1832, but as to such one-sixth in trust for the testator. The legal estate was, in 1833, conveyed by the vendor to the two survivors of the three, and to the representatives of the third (*Fairhurst* being no party to the conveyance). They declared they held this one-sixth for *Fairhurst*. The deed gave powers of management and power of final division, with the consent of the majority.

In 1839, *William Fairhurst* made his will, whereby he in the first place appointed *George Law* and *Edward Tilsdon* "to be his executors and trustees." He then devised and bequeathed his real and personal estate unto "his said trustees, their heirs, executors, administrators and assigns, according to the nature and tenure thereof, upon trust as to such part thereof as he held on mortgage or trust, or subject to any equity, to carry into effect the trusts thereof; and as to the residue of his said real and personal estate, to sell and dispose thereof at their discretion. And he declared, that the purchasers of his said estate should not be bound to see to the application of the purchase-money, and that the receipts of his trustees, or the survivor, should be in all cases sufficient." He then gave the proceeds of his

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said

1862. said estate to his three daughters, and their husbands

 BRASSEY and children.
 v.
 CHALMERS. *Tilston* disclaimed, and *Law* alone proved the will.

George Law (the devisee in trust and Executor of *William Fairhurst*) afterwards concurred with the other parties in a partition of the estate, which was apportioned, and the apportioned parts conveyed in severalty by a deed of the 28th of *November*, 1845, to the several owners, and roads were dedicated for the accommodation of the several parties. The question, which arose upon a sale of a portion of the estate allotted to another co-owner, was, whether this partition was or was not valid.

It was stated, as a fact, that *Fairhurst* received one-sixth of the rents from the date of the purchase (1832) to his death (1839); but there was no evidence of his ever having acquiesced in the provisions of the deed of 1833.


Mr. *R. Palmer* and Mr. *C. Hall*, for the Plaintiffs, the vendors. A good title can be made under the partition of 1845. The cases of *Abel v. Heathcote* (a); *M'Queen v. Farquhar* (b); and *Attorney-General v. Hamilton* (c), have reference to the doctrine of uses and to legal powers, shifting, by their due execution, the legal estate. Here there is no such question; for by the conveyance, the legal estate in the apportioned shares was conveyed to the owners in severalty, and the purchaser will, by his conveyance, obtain the legal estate discharged of all equities. The only question is, whether

(a) 2 *Ves. jun.* 100; 4 *Bro. C. C.* 278.

(b) 11 *Ves.* 467.

(c) 1 *Madd.* 214.

whether the trustees were not justified in concurring in the partition, that is, whether, upon a bill filed, the *cestuis que trust* could set it aside. The power of making a partition is incident to the estate of a tenant in common, even though he be a trustee. His co-tenants in common are entitled to have a partition, both at law and in equity, which they may at any time enforce. If therefore, upon a bill filed by another co-owner, the trustee would, by decree, be compelled to make a partition, he would equally be justified in performing that duty voluntarily, without putting the estate to the expense of a chancery suit, which must, of necessity, end in the same result. It cannot be a breach of trust for a trustee to do an act voluntarily, which the Court will adversely direct him to perform. Lord *Loughborough*, in *Abel v. Heathcote*(a), relied much upon the possession of the legal estate, and the means thereby afforded of defending an ejectment.


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The partition might easily have been effected by circuitry, as by selling the undivided part of the estate, and afterwards re-purchasing the divided part. *Abel v. Heathcote*, 2 *Sugd. Pow.* (b), 2 *Chance on Powers* (c). The disposition of the Court is to relax technical rules, and if the partition can be effected adversely or by circuitry, it will allow it to be done directly.

The terms of this particular power differ from those in the reported cases. Here it is “to sell and dispose thereof at their discretion;” the word “dispose” is placed in marked contrast with the word “sell,” and authorizes, by implication, a partition, which is necessary to enable the trustee to make a sale of the property to proper advantage.

(a) 2 *Ves. jun.* 100, and see
 1 *Madd.* 225.

(b) 507, 6th ed.
 (c) Page 375.

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vantage. A power to exchange is a proper one to include in a deed conveying an estate purchased by four persons, and the testator having for more than six years received one-sixth of the rent, with knowledge of his own title, must be taken to have acquiesced in the terms of the deed of 1833, which gave a power of division to the releasees.

In *Doe d. Knight v. Spencer* (a), it was held, that a power to exchange authorized a partition.

Mr. *John Baily* and Mr. *Druce*, for the purchaser. Trustees cannot, without an express power, make a partition. Here none is given. The power to sell does not authorize a partition, that has long been settled; and a power to dispose means to dispose of by way of sale, and not by converting an undivided interest in the whole of an estate into a several interest in part of it. Secondly, the partition is invalid, by reason of public roads being set apart for the use of the public, which the allottees are bound, for a limited time, to keep in repair. Thirdly, the purchaser would take the legal estate with notice of the invalidity of the partition, and he therefore would hold it subject to all the equities of the *cestuis que trust*.

Mr. *R. Palmer* in reply.

The MASTER of the ROLLS said he would consider the case.

(a) 2 *Exch. Rep.* 752.

The

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The power of making partition is not, it is clear, expressed in distinct terms in *Fairhurst's* will. It is contended, however, that it must be included in it by implication.

It is said, that the power "to sell and dispose" of the property "at their discretion," includes any species of disposition required for the legitimate management of the estate and for the benefit of the persons interested therein, and that it must therefore include partition before sale, in order to enable them to sell in such a manner as may be beneficial to the *cestuis que trust*.

It is further argued, that this direction in the will is not to be treated as a bare power to sell, which the Court must construe strictly, but as a trust, which the Court might and ought to construe liberally. But I am of opinion, that I cannot import a power of partition into this will, and that such a power is not implied or contained in the words I have read.

Notwithstanding some doubts which have been raised as to the effect of the decisions on this subject, and notwithstanding the case of *Abel v. Heathcote* (a), before Lord Loughborough, I consider this point to be really determined by the case of *M'Queen v. Farquhar* (b), and that of *Attorney-General v. Hamilton* (c). In *M'Queen v. Farquhar*, Lord Eldon, both during the argument and still more emphatically in the judgment, which was given after consideration, expressed his opinion, that a power of exchange did not include or authorize

(a) 2 Ves. jun. 98.

(b) 11 Ves. 467.

(c) 1 Madd. 214.


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authorize partition. The only point, however, which he actually decided, in that case, was, that a power of sale did not authorize partition, and he distinguished the case of *Abel v. Heathcote* from the case before him, and stated, that Lord *Loughborough's* decision in that case might be supported by the words, "other equivalent interest in these lands." Whether this be so or not, it is not important for me to inquire. I consider the clear effect of *M^cQueen v. Farquhar* to be this, viz., that if *Abel v. Heathcote* should be thought to sanction the doctrine either that a power of exchange or a power of sale, expressed in ordinary terms, authorizes partition, that doctrine is not to be supported, and that it is, in truth, overruled by and is inconsistent with the decision of *M^cQueen v. Farquhar*.

The same point also underwent discussion in the case of *Attorney-General v. Hamilton*, where Sir *Thomas Plumer* decided, that a power to exchange would not include or authorize partition.

The words in this case are, "*to sell and dispose thereof at their discretion*," followed by a declaration, that the purchasers are not required to see to the application of the purchase-money, and that the receipts of the trustees shall be sufficient discharges. This is, in my opinion, nothing more than a simple power of sale. The words "*to dispose thereof*" are, I think, mere words of surplusage, and mean no more than that the trustee is to dispose thereof by sale, and consequently, that the discretion given to the trustees is confined to a sale and a disposition by sale of this property, and that there is no power to make partition given by the will of *William Fairhurst*, and consequently, that it is not competent for the trustees of his will to enter into any valid and binding

binding agreement for partition, without the consent and authority of all their *cestuis que trust*.

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But then it is contended, that even if this be so, it does not practically affect the question as to the validity of the partition, for that, with respect to the legal title in this case, no question or difficulty arises, inasmuch as the legal fee is now vested in the allottees of the various shares, under the deed of partition, so that the question in contest can only affect the equitable interest, and that the equitable interest is, in truth, bound by the acquiescence of *William Fairhurst*, who for six years received one-sixth of the rents of the estate, and must be held to have been cognizant of his title. In support of this proposition, the observations of Lord *Loughborough*, in *Abel v. Heathcote*, are referred to, to show that he relied much, in that case, upon the possession of the legal estate, and the means thereby afforded of defending an action of ejectment.

I am, however, unable to accede to that argument. It is true, that here the legal estate is conveyed according to the agreement of partition, but I am of opinion, that if I am right in the conclusion I have come to, the trustee under *William Fairhurst's* will had no power or authority to enter into any such contract of partition; and it follows, as a necessary consequence, that his *cestuis que trust* will not be bound by the partition and conveyance which has taken place, and that it was, in truth, a breach of trust in the trustees so to convey it, and that unless the *cestuis que trust* under *William Fairhurst* are bound by acquiescence, either by some act of their own or by some act of some person through whom they claim, they may dispute the propriety of the partition, and contend that a smaller and less valuable portion of the estate was allotted to them than that which they might

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might have obtained under a fair division. No fact is stated from whence any acquiescence or sanction can be inferred or presumed, to bind any person claiming under the will of *William Fairhurst*. I am also of opinion that *William Fairhurst* himself cannot be treated as having acquiesced in any such partition; all he did was this: he received one-sixth of the rents of the estate before it was partitioned; this was what he was entitled to receive, even if no partition had ever been intended; and this implies no acquiescence in any peculiar division of the property, much less in that division which was settled after his decease.

I am of opinion, therefore, that the share in this property originally belonging to *William Fairhurst* has not been ascertained in severalty, by any division which can bind the persons beneficially interested in it, and this consequence necessarily follows, that, inasmuch as one-sixth share is not ascertained, none of the remaining shares can be. It therefore follows, that in my opinion the first question submitted to the Court must be answered in the negative, by stating that the indenture or deed of partition of the 28th of *November*, 1845, is not valid and binding, as against persons claiming or beneficially interested under the wills of *Joseph Harrison*, *Thomas Harrison* and *William Fairhurst* respectively.

Having come to this conclusion, it is unnecessary to express any opinion on the point, whether, if the power of partition had existed, it was well executed by reserving a portion of the estate unallotted to any one, for the purpose of making a road to render parts of the property accessible and more valuable.

Another

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Another question on this special case was, whether under a power contained in the will of *Joseph Harrison*, *Thomas Brassey*, the survivor of his two executors, could sell his real estate.

In July, 1832, *Joseph Harrison*, who was entitled to one-sixth share of the real estate in question, made his will, the material portions of which were as follows:—

“Subject to the payment of my just debts and funeral and testamentary expenses and legacies, I give and devise all my freehold and copyhold estates unto and to the use of *William Ravenscroft* and *John Fisher*, their heirs and assigns, upon the trusts hereinafter mentioned. I direct all my contracts for the sale or purchase of property to be fulfilled. I authorize and empower *my executors hereinafter mentioned, with the approbation of my trustees for the time being*, to sell and dispose of, by private contract or public auction, from time to time, all or any parts of my said freehold estates, and to exchange the same or any part thereof for other freehold or leasehold property of equal value, or which may, by the payment of a sum of money on either side, be made of equal value, and to make partition of such parts as I may be interested in with other persons. I authorize *my executors* to carry on my business, &c.” “I direct *my executors* to collect, get in, and convert into money, all my personal estate, &c.” “Further, I direct *my said executors*, with such approbation as aforesaid, and in the names of my trustees, to invest the monies which may be derived from such sale or exchange, or from my personal estate, or my business, if carried on after my decease, in government or real securities; or to purchase, in the names of my trustees for the time being, such other real or leasehold property as my trustees shall approve

Where a naked power is given to several, it cannot be exercised by the survivors; but if a power be annexed to an office, any persons filling the office may execute it.

Power “to my executors hereinafter mentioned, with the approbation of my trustees for the time being,” to sell real estate, held by the *Master of the Rolls*, upon the context, not to authorize a sale by the survivor of the executors; but the Lords Justices dissented from this decision.

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approve of: and I authorize my *executors*, with such approbation, from time to time, to vary the said securities and resell the purchased property."

The testator declared that the receipts of his trustees should be good discharges to purchasers and others, who should not be bound to see to the application of the monies therein expressed to be received; and he appointed *Thomas Seacome* and the Plaintiff *Thomas Brassey* executors of his will.

The testator died in 1832, his executors proved his will and his trustees accepted the trusts.

Seacombe, the executor, died prior to 1844, *William Ravenscroft* died in 1849, and *Fisher* in August, 1851; and by an order of this Court, made in December, 1851, *Samuel Holme* and *John Ravenscroft* were appointed trustees of the will of the testator, and his real estates were vested in them.

In 1852, *Brassey*, the surviving executor, with the approbation of *Holme* and *John Ravenscroft*, contracted to sell a part of the testator's real estate to the Defendant, who refused to complete, on the ground that *Thomas Brassey*, the surviving executor, was not empowered to sell.

Mr. *R. Palmer* and Mr. *C. Hall*, for the vendors, cited 1 *Sugden on Powers* (a), and *Forbes v. Peacock* (b).

Mr. *John Baily* and Mr. *Druce*, for the purchaser, cited *Newman v. Warner* (c).

The MASTER of the ROLLS reserved judgment.

The

(a) Page 141, 6th ed. *lips*, 717.
 (b) 11 Sim. 152; 12 Sim. 528; (c) 1 Sim. (N. S.) 457.
 11 *Mec. & W.* 630, and 1 *Phil-*

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This question depends on the words of the will, and whether the powers of sale thereby given is given to *Thomas Seacombe* and *Thomas Brassey* as individuals or in the character of executors of his will.

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It is settled, by repeated authorities, that where a naked power is given to several persons, it cannot be executed by the survivors. It is a power, the execution of which is intrusted to several individual persons jointly, which can only be executed by them all, and if one of them should die the authority will not survive. It is also equally settled, that if the power be annexed to the office any persons who fill the office of executor will have also the power which is attached to that office. The difficulty arises in cases like the present, where the power is given to certain persons by name, and they are also appointed executors, and in these cases the proper distinction seems to be that stated at the bar, viz. that it is incumbent on the Court to ascertain in such cases whether the power is given to the executor or to the person. In this case, I think that the power is given to *Thomas Seacombe* and *Thomas Brassey* individually, and not to them in their character of executors. That it is not given to the executors simply is plain. The words "to my executors hereinafter mentioned" are, in my opinion, equivalent to these words, viz. "to my executors *Thomas Seacombe* and *Thomas Brassey*," whom I hereby appoint executors; in which latter case I should consider, that the power was given to the individuals. This view of the case is confirmed by the rest of the will. The executors are occasionally referred to generally as "my executors," and occasionally individually as "my said executors." And it was, in my opinion, well

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well observed by Mr. *Baily*, that the reference to them as individuals occurs in every case which relates to the sale of the land, and not in any other case. Thus the direction to carry on the business of the testator, to get in and convert his personal estate, and to vary securities, is intrusted "*to my executors*" generally; but the direction to sell is given to "*my executors hereinafter mentioned*;" and the direction to invest the monies arising from the sale is given "*to my said executors*." It is further to be observed, that the power to sell is to be exercised with the approbation of these trustees for the time being, and the will does not contain any power for the appointment of new trustees when those appointed by the testator should fail; at least so I infer, from the circumstance, that no such power is stated in the case, and that on failure of the testator's trustees, new trustees were appointed by the Court of Chancery in *December*, 1851. This power, therefore, was to be executed, subject to the approbation of certain persons appointed by the testator or of the survivor of them. This also confirms the construction already stated, as it appears to show the testator's belief, that the power could be executed by the persons named as executors only while they were alive and held the office, it being restricted to be executed with the consent of his trustees or of the survivor of them, and it being probable that a sufficient time would elapse, before the death of both the trustees occurred, to enable the executors to execute this power.

It is to be observed also, that he makes, in the same sentence, a distinction (which for this purpose is material) between the trustees and the executors, inasmuch as he directs the sale to be made by the executors thereinafter mentioned, but the sale is to take place with the approbation of these trustees *for the time being*. If he had intended to give the power to the office, he would, probably,

probably, have used the same expression, and would have confided the power, not to the executors herein-after mentioned, but to the executors for the time being.

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I am therefore of opinion, that the power is given to the two executors *nominatim*, and not in their executorial character; and that consequently it could only be executed by them jointly.

I forbear to say anything on the question raised at the bar, as to the implied power of sale in the executors further than this: that in the peculiar terms of the will, and the expressed power directly given to the executors, I am of opinion, that no such power of sale can be implied. And I also forbear to say anything as to another question raised at the bar; viz. whether the testator can be considered to have reposed any confidence in the trustees appointed by the Court of Chancery. The result of my opinion is, that this second question must be answered by saying, that the will of *Joseph Harrison* does not empower the Plaintiff, *Thomas Brassey*, with the approbation of *Samuel Holme* and *John Ravenscroft*, to sell the estates subject to the trusts by such will declared of the freehold estates thereby expressed to be devised to *William Ravenscroft* and *John Fisher*.

NOTE.—The Lords Justices, on appeal, did not concur in this decision. The case was not very fully argued, but *Houell v. Barnes* (Cro. Car. 382) was principally relied on. Another suit of *Seacombe v. Holme*, was, at their suggestion, instituted, making all persons interested parties; and it appearing to the satisfaction of the Court, that it would be for the benefit of all parties, *not sui juris*, that the attempted partition should be confirmed, it was confirmed accordingly; and on the special case, it was then declared, that the will of *Joseph Harrison* empowered *Brassey*, with the consent of *Holme* and *Ravenscroft*, to sell.

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STANSFIELD and Others, on behalf, &c. v. HOBSON.

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A mortgagee, after being in possession more than twenty years without account or acknowledgment, wrote to the Plaintiffs' solicitor,—“I have received yours of the 2nd instant; I do not see the use of meeting either here or at *M.*, unless some one is ready with the money to pay me off.”

Held, that this was a sufficient acknowledgment to take the case out of the statute (3 & 4 Will. 4, c. 27, s. 28).

Letters written by a mortgagee to his own solicitor cannot affect the mortgagee's right to the benefit of the statute of limitations.

IN this case, the trustees of a building society had mortgaged the property to the Defendant *Hobson*, who entered into possession in 1825, and had ever since retained possession. The only acknowledgment which the Court considered of importance was contained in a letter, written by *Hobson* to the Plaintiffs' solicitor on the 5th of *February*, 1850, which contained the following passage:—“I have received yours of the 2nd instant. I do not see the use of a meeting here or in *Manchester*, unless some party is ready with the money to pay me off.”

The Plaintiffs, by the present claim, sought to redeem the property.

Mr. *Elmsley* and Mr. *Osborne*, for the Plaintiffs.

Mr. *R. Palmer* and Mr. *Humphreys*, for the Defendant, contended, that this was not a sufficient acknowledgment of the mortgagor's title or right of redemption within the 3 & 4 Will. 4, c. 27, s. 28.

Trulock v. Robey (a); *Hodle v. Healey* (b); *Batchelor v. Middleton* (c); *Hyde v. Johnson* (d), were cited.

The MASTER of the ROLLS held that there was no acknowledgment, unless the above letter amounted to one; and he reserved his judgment on that point.

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(a) 12 Sim. 402.
(b) 6 Madd. 185.

(c) 6 Hare, 75.
(d) 2 Bing. N. C. 776.

The MASTER of the ROLLS.

This is a claim instituted for the purpose of redeeming an estate mortgaged to *John Hobson*, and the only question which arises is, whether a letter sent by him to the solicitor of the mortgagor, or of one of the mortgagors, in *February*, 1850, after twenty years had elapsed from the time when *Hobson* had entered into possession, is such an acknowledgment as to take the case out of the statute. I expressed my opinion at the hearing, which I now repeat, that the letters written by *Hobson* to his own solicitor can, in no degree, affect his right to the benefit of the statute (a) as a bar to the claim of the Plaintiffs; and I reserved my judgment as to the effect of the letter. It is in these terms:—"Sir, I received yours of the 2nd instant. I do not see the use of a meeting here or in *Manchester*, unless some party is ready with the money to pay me off." This was in answer to an application to ask him to meet; but the letter itself of the 2nd of *February*, to which this is an answer, has not been produced. I reserved my judgment for the purpose of looking through the authorities, and it appears to me, that the statute has only made a difference in this respect, that that which before the statute was a sufficient parol declaration must now be "in writing, signed by the mortgagee or the person claiming through him." It is very difficult to reconcile all the authorities on this subject, which are very various. I was however referred to one of *Trulock v. Robey*; and the question is, whether the present case can properly be distinguished from it. There the letter was in these terms:—"Sir, concerning the business at *Hendrid*, which you know nearly

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(a) *Batchelor v. Middleton*, 6 Hare, p. 84; *Lucas v. Dennison*, 13 Sim. 584.

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nearly as well as myself, as there has been nothing kept from you, *which I am very willing to settle, if your grand-daughter is of age.* I never told you any other way's, as I have been informed she has been the heiress of what there is." The Vice-Chancellor of *England* held, that the last-mentioned letter was a sufficient acknowledgment to take the case out of the statute and an admission of the heir's right to redeem the mortgage.

Upon the fullest consideration, I cannot distinguish these two cases, both of which appear to me to be acknowledgments of the title of the mortgagor; that is to say, an acknowledgment by the mortgagee that he holds the estate by mortgage title. The one letter expressly states, that "he is very willing to settle, if the grand-daughter is of age;" the other infers, he will meet, "if some party is ready to pay him off;" and I think that I could not hold that this letter was not a sufficient acknowledgment within the statute, without overruling the case of *Trulock v. Robey*. It is very difficult to say whether *Trulock v. Robey* is quite consistent with all the other cases; but it is impossible to read the numerous cases, in which expressions have been held to amount to an admission of the mortgagor's title within the statute, without seeing that they run upon very fine distinctions, and some of them are so extremely difficult to reconcile, that I think I should do wrong, if I were not to follow the latest decision which appears to me to govern this case.

I am therefore of opinion, that in this case there must be a decree for redemption.

NOTE.—Affirmed by the Lords Justices, *March 2, 1853.*

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ON the 21st of *April*, 1846, the Plaintiff entered into a contract with the Defendant, which was expressed in a letter addressed by the Plaintiff to the Defendant, in the following terms:—"Dear sir, I undertake and agree to hire of you the house and buildings called New England Farm, at a rental of 100*l.* per annum, from the 24th *June* now next ensuing, together with the land, being about five acres, and I agree to pay down to you, on that day, the sum of 650*l.*, and it is understood and agreed, that *I am to have a purchasing clause of the said estate, at any time within nine years, by giving you three months notice, for the sum of 2,500*l.* in addition to the sum of 650*l.**"

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A tenant was to have a purchasing clause, at any time within nine years, by giving three months notice. He gave the notice at the end of four years, and delays occurring, the three months elapsed. Afterwards, the landlord threatened hostile measures to compel a completion, but subsequently gave notice, that unless the purchase

The Plaintiff paid the 650*l.*, entered into possession, and made alterations and improvements on the property.

On should be completed within six weeks, he should treat the notice void and the right of purchasing as forfeited. The purchase was not completed within the six weeks. Held, first, that though a conditional right to purchase must be strictly complied with, yet time was not, in this case, of the essence of the contract; secondly, that if it had been, it was waived by the landlord's insisting on the contract after the expiration of the three months; thirdly, that time was not made of the essence of the contract by the notice; and, fourthly, that six weeks was not, under the circumstances, a reasonable time.

A purchaser having retained the abstract for five months, made no objections to the title, but simply required the vendor to verify the abstract with the title-deeds. Held, that he must be deemed to have accepted the title.

DATES.

1846. — Contract.	1850, <i>Nov.</i> 2 Notice to complete.
1850, <i>May</i> 14. Notice to purchase.	1850, <i>Dec.</i> 5. } Correspondence.
1850, <i>July</i> 4. Abstract sent.	1850, <i>Dec.</i> 6. }
1850, <i>Aug.</i> 14. Three months expire.	1850, <i>Dec.</i> 14. Six weeks expire.
1850, <i>Sept.</i> 4. Defendant's letter.	1851, <i>Jan.</i> 10. Bill.

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On the 14th of *May*, 1850, the Plaintiff gave the Defendant notice to purchase, and required an abstract of title, which was not sent until the 4th of *July*. The three months expired on the 14th of *August*, after which, on the 4th of *September*, the Defendant's solicitor wrote as follows:—"It is now more than three months since Mr. *Pegg* gave notice of his intention to purchase, and our client is very urgent. We should be very sorry to take any hostile measures, but shall be obliged to do so, if there be any further delay, and hope to hear from you without loss of time."

On the 2nd of *November*, the Defendant gave the Plaintiff notice, that unless he completed his purchase on or before the 14th of *December*, 1850, he should treat the notice of purchase void, and the right of purchase as forfeited. On the 5th of *December*, the Plaintiff's solicitor applied to know where the deeds might be examined, which application was answered on the 6th of *December*, and disputes then arose as to the costs to be borne by the Defendant, and some profitless correspondence took place on the subject.

The six weeks having expired on the 14th of *December*, the Defendant refused to complete, and the Plaintiff filed his bill for a specific performance on the 10th of *January*, 1851. The cause now came on for hearing.

Mr. *R. Palmer* and Mr. *Bevir*, for the Plaintiff.

The MASTER of the ROLLS called on the Defendant.

Mr. *Willcock* and Mr. *Hingeston*, for the Defendant.
 Where a tenant has the option of purchasing an estate the conditions must be strictly complied with, otherwise
 the

the right is lost. The case is similar to the right of repurchasing an annuity. As to this, Lord *Cottenham*, in *Joy v. Birch* (a), thus laid down the law :—" It is a well established rule, that under a clause of repurchase of this description, being for the purpose of determining an interest, the terms of the proviso of repurchase must be strictly complied with. That doctrine was clearly laid down in *Barrell v. Sabine* (b), and it was confirmed in a case, in this house, of *Ensworth v. Griffiths* (c). In *Davis v. Thomas* (d), Sir *John Leach* said, ' Where there is no stipulation for penalty or forfeiture, but a privilege is conferred, provided money be paid within a stated time, there the party claiming the privilege must show that the money was paid accordingly.' In *Barrell v. Sabine* (b) it was held, that where there is a clause or provision in the conveyance for the vendor to repurchase, the time limited for that purpose ought to be precisely observed. It was therefore necessary for the party claiming the right to repurchase, strictly to comply with the terms of the provision ; he was bound to give a regular notice, and he was also bound to pay according to that notice, unless he was prevented from doing so by the situation of the party to whom the notice was given, or who was to receive the money. He was bound therefore to show that he paid the money, or did do that which was equivalent in law to payment."

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Secondly.—But even if time be not originally of the essence of the contract, it may be made so by notice, where there has been an improper delay in completing, *King v. Wilson* (e), and *Southcomb v. The Bishop of*

(a) 4 Cl. & Fin. p. 89.

(d) 1 Russ. & Mylne, 506.

(b) 1 Vern. 268.

(e) 6 Beav. 124.

(c) 5 Brown's P. C. 184.

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of Exeter (a). Here due notice has been given and has expired, and the contract and all right to purchase has ceased. By the notice, the power to purchase became exhausted and could not be afterwards exercised; if it were otherwise, the Plaintiff might go on for nine years giving notice to purchase every three months and making default. Such cannot be the reasonable construction of the contract.

Thirdly.—If a decree be made, there must be no reference as to title, as it has been accepted. They also referred to *Townley v. Bedwell* (b) and *Laves v. Bennett* (c).

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I have no doubt as to some portion of the decree which the Plaintiff is entitled to. I fully concur in the observation as to the law of the Court; but the only question is as to its application.

The first point was, whether under the contract I was to read the following words in this contract—"I am to have a purchasing clause of the estate, at any time within nine years, by giving you three months' notice, for the sum of 2,500*l.* in addition to the sum of 650*l.*" to mean this:—"I am to have, &c.; but if, at the expiration or end of three months, the purchase is not completed, the option shall be gone, and you shall not be entitled to purchase the estate at all." I am of opinion that to introduce such a clause would be not only straining the words of the contract, but be introducing

(a) 6 *Hare*, 213.

(b) 14 *Ves.* 591.

(c) Cited 14 *Ves.* 596.

ducing something totally foreign to the intention of the parties.

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I concur in this :—that this case must be looked at as an ordinary case of a purchase by a tenant from his landlord; and that if a landlord lets property to a tenant, and says, “ You shall have the opportunity of purchasing within a given time,” the condition is to be construed strictly. Here three months’ notice was to be given, and I am of opinion that, at the expiration of the three months from the 14th of *May*, the relation of vendor and purchaser was constituted between the parties, and that the Plaintiff had ceased to be tenant, and, in equity, became owner of the estate.

Is time of the essence of the contract? In terms it is not, and it cannot be said, that, if the contract be not completed at the end of three months, the contract is determined. But if time had originally been of the essence of the contract, I think it was waived. The vendor was fifty-one days before he delivered the abstract, and after the three months had expired, he insisted on the contract; for on the 4th of *September* he writes, in effect, “ if there be any further delay in completing, I must take hostile measures to compel you.” I think, therefore, that the three months did not limit any time, and that, if it did, it was waived by that letter.

The argument rested on the notice on the 2nd of *November*, 1850, in which the Defendant said, if you do not complete within six weeks, I shall insist that the contract is at an end. There is a great peculiarity in this case, arising out of the relation of the parties. The purchaser was in possession, interest was paid either in the shape of rent or as interest, and the Defendant

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Defendant peremptorily fixes six weeks for the completion of the purchase. What takes place? The Defendant has never waived the six weeks; but he has given the Plaintiff a shorter time to complete than he himself took for the delivery of the abstract. In the meantime, the purchaser goes on to complete, and during the interval, takes steps to satisfy himself of the title, and proceeds to examine whether the abstract corresponded with the deeds. This goes on down to the 10th of *December*, 1850, when a foolish squabble arose as to the expenses, which seems to have been settled. This occasioned some delay in the verification of the abstract, and five more days having elapsed, the Defendant says, "I bind you to the six weeks, and will not complete the purchase," and he obliges the Plaintiff to file his bill on the 10th of *January*, 1851.

In this state of things, I am of opinion that time was not of the essence of the contract, and was not made so, and that the Plaintiff is entitled to have a specific performance of the contract.

I concur with the authorities, that where a condition is necessary to be performed by one to entitle him to become a purchaser, it must be strictly performed. I concur also in the decisions, that where time is not originally the essence of the contract, it may, in the case of improper delay, be made so by notice; but I think the relation between these parties was such, that six weeks was not a reasonable time within which the Defendant was entitled to insist on having it performed.

I think the Plaintiff must be taken as having accepted the title. As to possession, the case is different where a party takes possession, and where he is already in possession; but considering the time which
has

has elapsed subsequent to the delivery of the abstract, that no objection has ever been raised or inquiries made as to the title, and that all that the Plaintiff has required has been to verify the abstract, I think it must be taken that there has been an acceptance of the title.

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WISDEN.

Mr. *R. Palmer*.—There is no allegation in the pleadings that the title has been accepted.

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Then as I cannot say that there has been an acceptance of the title, I will, if the Defendant asks it, give him a week to bring his objections into my chambers, and they will then be argued in open Court. I shall not follow the rule as to inquiring when a good title was first shown, for the Plaintiff having succeeded is entitled to the costs down to the hearing.

Re MATTHEWS.

MR. *MATTHEWS*, a solicitor of this Court, had, for family reasons, changed his name, and assumed that, of *Chamberlain* in addition. A motion was now made on his behalf, that a corresponding alteration might be made on the Roll of Solicitors. The motion was supported by an affidavit that the change had not been made with any improper motive.

Nov. 19.

A solicitor having changed his name, a corresponding variation was ordered to be made on the roll of solicitors.

Mr. *Beavan*, in support of the motion.

The MASTER of the ROLLS directed the usual order to be made. It was accordingly ordered, that the name of *Chamberlain* should be entered on the Roll of Solicitors

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 Re  
 MATTHEWS.

citors opposite the name of *J. Matthews*, so that the name of *J. Matthews* should stand as *J. Matthews Chamberlain*, and that an indorsement be made accordingly on the admission of the said *J. Matthews*.

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NOTE.—See *Ex parte James*, 5 *Exch. R.* 310; *Ex parte Moses*, 19 *Law J. (Q. B.)* 345; *Ex parte Dearden*, 5 *Exch. Rep.* 740; *Ex parte Daggett*, 1 *L. M. & P.* 1.

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Nov. 20.

In 1819, a person entitled to a share in a coal mining company became bankrupt. Dividends were declared in 1831, 1838, and subsequently. The bankrupt's shares were carried over to a separate account in the company's books down to 1850, but no claim was made by the assignees until that year. Held, that the right of the assignees to these dividends still subsisted, but that they were not entitled to any profits made by their retainer.

### PENNY v. PICKWICK.

IN 1781, five persons obtained a lease of a colliery for fifty years, which was afterwards extended for thirty more years, at a royalty, and they established a company called "The *Camerton Coal Company*." *Matthew Brickdale*, who, by assignment, was entitled to two twentieth shares, became bankrupt in 1819. The company was then in a very depressed state, no dividend having been declared since 1816, and it was then considerably in debt. No claim was made by his assignees, and the concern continued altogether unprofitable until 1831, when another dividend was declared. No further dividend was declared until 1838, and then a resolution, unauthorized by any power in the deed, was come to, forfeiting the shares, but directing the profits to be carried to a separate account, "to be dealt with as the company should subsequently order."

Subsequently, dividends were annually declared and carried over in the company's books, to an account headed


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#### DATES.

1816. Dividend.  
 1819. Bankruptcy.  
 1831. Next dividend.

1838. Dividend and resolution  
           forfeiting shares  
 1850. First claim of assignees.

headed, "The proprietors of a share in this concern, heretofore Mr. *Brickdale's*." In *March*, 1849, these dividends amounted in the whole to 2,432*l.* In 1850, the assignees of *Brickdale*, for the first time, claimed these dividends, and the payment being resisted, they filed this claim, in 1852, against the other proprietors, for payment of the 2,432*l.* and of the profit made there-with by the Defendants.


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Mr. *R. Palmer* and Mr. *Kinglake*, for the Plaintiffs. If the bankruptcy worked a dissolution, it then became the duty of the managing body to sell and wind up the concern, otherwise the assignees continued entitled to the profits. There was no ground for any claim until a dividend had been declared, and then it was carried over to the account of *Brickdale's* shares.

If the Statute of Limitations be relied on by the Defendants, the answer is, that it is inapplicable to the case. First, because it is a case of partnership and open account; secondly, because the legal owners of the lease are trustees; and thirdly, because there has been an acknowledgment of the right of the representatives of *Brickdale*, and an annual appropriation to them of the dividends on their shares. There has been no adverse possession, to allow the statute to operate; *Pickering v. Lord Stamford (a)*.

Mr. *Roupell* and Mr. *Baggallay*, *contrà*. Thirty-three years have elapsed since the bankruptcy, and no demand has ever been made by the assignees. They are therefore barred by their laches, by the lapse of time, and the Statute of Limitations. In a trading concern, the assignees were bound to take upon themselves the responsibilities of partners

(a) 2 *Ves. jun.* 272; 3 *Ves.* 332.

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partners, if they intended to claim the benefit of the shares. They could not stand by and take the chance of the profits, without incurring the responsibility of the losses, *Prendergast v. Turton* (a). The private memoranda of the company in their own books, uncommunicated to the assignees, could not give them any right which they did not independently possess.

*The MASTER of the ROLLS.*

I think that the Plaintiffs are entitled to a decree, and that *Prendergast v. Turton* does not apply. There, a party, whose share had been forfeited, thought fit to lie by and see if the company should become prosperous, and he made no claim for a long period of time. Here the case is perfectly distinct. I cannot see what steps the assignees could have taken until 1831; for until that time, the partnership was producing no profit at all. It is suggested, that a bill ought to have been filed as soon as a dividend had been declared. If the company had only declared this dividend in 1831, if no claim had been made from that time to the present, and the assignees had then, for the first time, insisted on their right, a different state of circumstances would have arisen. But, here, the company have all along treated these as existing shares and like the shares of all other proprietors. They have ascertained the profits with reference to them, divided them in proportion, and carried over the dividends in their books to the use of the proprietors of these shares. The last entry is in the year 1849, when they acknowledge that this amount of dividends is due to the proprietors, "to be dealt with," it is said, "as the company should subsequently order;" but that does not mean that the persons who claim under

*Matthew*

(a) 1 *You. & Coll. C. C.* 98.

*Matthew Brickdale* are not to be entitled. Down to 1849, as it appears to me, there is a recognition by the persons who managed the concern, that in respect of *Brickdale's* shares, the persons who were entitled to these shares were entitled to this amount. I am of opinion that the Plaintiffs are entitled to the amount of these dividends, though not to the profits. If they had applied earlier, they could have obtained payment.

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PENNY  
v.  
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The Plaintiffs must have the general costs, for their case was resisted by the company, in contradiction to the entries in their books.

## MARSHALL v. FOWLER.

A TESTATOR died in 1837, having bequeathed his residuary estate to one for life, with remainder to a class.

Nov. 20.  
The whole of a fund to which the husband, in right of his wife, had become entitled, settled, as against his assignee, on the wife and children, the husband being in reduced and insolvent circumstances.

In 1851, the tenant for life died, and Mrs. *Marshall*, the wife of *John Marshall*, then became, as one of the class, entitled to 468*l.* Consols, 550*l.* Three-and-a-quarter per cents. and 1,213*l.* Reduced. She was also entitled (subject to the existing life interest of *W. F.*) to one-fifteenth of 4,000*l.* Three-and-a-quarter per cents.

In 1838 and 1841, Mr. *Marshall* and his wife had assigned their interest in the residue to secure certain monies, which were now claimed by the Defendant *Pierson*.

Mrs. *Marshall* filed this claim against the executors, *Pierson* and her husband, claiming to have the fund settled.

No

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 v.  
 FOWLER.

No settlement had ever been made on her; and her husband, who had formerly carried on the trade of a brewer, had since 1841 become utterly insolvent, and had no means of supporting his family, except through the bounty of his friends and casual employment as an accountant. They had six children, three under age.

Mr. *R. Palmer* and Mr. *Morris*, for the Plaintiff, asked, that the whole fund might be settled, the husband being insolvent, and unable to support his family.

Mr. *Pearson*, for the Defendant *Pierson*, argued, that the whole fund ought not to be settled to the utter exclusion of the rights of the husband.

*Brett v. Greenwell*(a); *Napier v. Napier*(b); *In re Cutler*(c); *Scott v. Spashett*(d); *Dunkley v. Dunkley*(e); and see *Ex parte Pugh*(f); *Carter v. Taggart*(g).

The MASTER of the ROLLS directed the income of the whole fund in possession to be paid to Mrs. *Marshall* for her life, for her separate use, &c., with remainder to her children, with liberty to apply as to the one-fifteenth of the 4,000*l.* when it should fall into possession.

(a) 3 Y. & Coll. 230.

(b) 1 Dru. & War. 410.

(c) 14 Beav. 220.

(d) 3 Macn. & G. 599.

(e) 2 De G., M. & G. 390.

(f) 1 Drewry, 202.

(g) 5 De G. & Sm. 49.

1852.

ROUTH v. TOMLINSON.

**B**Y the decree made in 1850, a reference was directed to the Master, and it was ordered, that the Defendant should *be examined upon interrogatories*, as the Master should direct. The 15 & 16 Vict. c. 80, and 15 & 16 Vict. c. 86, having passed, it was now moved, that the Master might be at liberty or be directed, to permit the Plaintiff to examine the Defendant *Tomlinson vivâ voce* instead of upon interrogatories.

Nov. 9, 22.  
Application under the Chancery Improvement Acts (1852) to examine a Defendant *vivâ voce* in the Master's Office refused, the decree having directed the examination upon interrogatories.

**Mr. Lloyd** and **Mr. W. H. Clark**, in support of the motion, relied on 15 & 16 Vict. c. 80, ss. 7, 13, 29, 30, 31, 38, 39; 15 & 16 Vict. c. 86, ss. 39, 40; and *Cable v. Cooper (a)*.

**Mr. Follett** and **Mr. Kinglake**, *contrâ*.—The Court has, by its decree, ordered the examination to be on interrogatories, and the decree cannot be varied on motion. If the Master has jurisdiction, the order asked is unnecessary; if he has not, the act does not authorize the Court to give it to him, *Mildmay v. Methuen (b)*. The proper course is to allow the Master to proceed, and if he is wrong, to except to his report, for no case is at present shown for interfering with his discretion.

**The MASTER of the ROLLS.**

**I** will not dispose of this case until I have consulted the other Judges.

*The*

(a) *V.-C. Stuart*, Nov. 8, 1852.

(b) 1 *Drewry*, 216.

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Nov. 22.

*The MASTER of the ROLLS.*

I have consulted the other Judges, and we are of opinion, that the Acts do not apply to causes which were in the Masters' Offices when they came into operation. I must therefore refuse the motion.

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NOTE.—See *Wood v. Homfray*, 14 *Beav.* 7.

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*MELLERS v. The Duke of DEVONSHIRE.*

Nov. 22.

Demurrer allowed to a bill by the lessee of a coal mine, to be relieved from his rent on the ground of a deficiency of the coal to be worked.

A. demised a coal mine to B. at 60*l.* per acre for the coal gotten, and B. covenanted to work not less than two acres annually or pay the rent for that quantity, "whether the same should be got or not." There was a proviso for cesser if all the coal was

THIS case came before the Court upon demurrer, and according to the statements of the bill, the Duke of *Devonshire* and another, on the 26th of *September*, 1825, granted a lease for twenty-one years to *Mellers*, of all or so much of specified coal mines as could be laid dry, at a rent of 5*s.* and a royalty of 120*l.* for every acre of *Blackwell* hard coal, and 60*l.* for every acre of *Dunshill* coal, which should be raised during the term. *Mellers* covenanted to pay the rent and royalty, and, in every year, to raise "not less than two acres of *Blackwell* hard coal and two acres of *Dunshill* coal, or pay for such respective quantities, in each and every year, after the rates aforesaid, *whether the same should be got or not.*"

And it was provided, that if *Mellers* should, from any unavoidable accident happening to the said works or

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exhausted. At the end of the term, the lessee, alleging that there was a deficiency in the coal, and that, from "inevitable causes," it was impossible to get two acres annually, and that during the term he had paid for more than he had got, sought to recover back the excess. A demurrer was allowed, on the ground that the covenant was absolute, and the lessee was bound to pay whether he got the quantity or not, and that there was no allegation of an actual exhaustion of the coal.

other inevitable cause, be prevented from and unable to get, in any one year, the respective quantities of coal thereinbefore covenanted to be gotten or paid for in each and every year, then, that he should be at liberty, in in the subsequent years of the said term, to get such deficiency in quantity, without paying any royalty for the same; and that if *Mellers*, his executors, administrators and assigns, could not sell the whole of the *Blackwell* hard coal thereinbefore covenanted to be gotten, he should be at liberty to get so much more of the *Dunshill* coal, as would make up the said yearly rent of 360*l.*, after the rates of 120*l.* an acre for the hard coal, and 60*l.* an acre for the soft coal, as aforesaid. And that if, from digging in each or any of the preceding years, a greater quantity of coal than was thereinbefore stipulated to be gotten in each year or otherwise, all the coal thereby intended to be demised should be exhausted before the expiration of the term thereby granted, then and in such case the term thereby granted and the rents thereby reserved should cease and be at an end.

The term expired in *September*. 1846, and in *June*, 1852, the representatives of the lessee filed this bill against the lessors, alleging that before 1826 all the *Blackwell* coal which could be laid dry had been worked and exhausted, and that none was afterwards laid dry; "but the fact of such exhaustion was, at the time of the execution of the said lease, wholly unknown to the parties thereto."

The bill stated, that in consequence of "meer faults and distractions" in the mines, the lessee, from "inevitable causes," was prevented getting any *Blackwell* coal after 1840, and, except in five specified years, the two acres of *Dunshill* coal. That during the term, the lessee raised sixteen and a half acres only of *Blackwell* hard

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1852. *hard coal, and thirty-three acres of Dunshill, which at the rate per acre above specified amounted to 3,776l., and that during the term he had paid to the lessors 760l. more than that sum, and had given a security for a further sum of 760l. It alleged, "that on the settlement of all accounts under the said lease," there was due to the lessee 760l., which ought to be repaid, and the mortgage security ought to be delivered up to be cancelled.*

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*The Duke of*  
*DEVONSHIRE.*

The bill charged, that the terms and stipulations of the lease, as to the working of the coals, could not be carried into effect, and that no means whatever existed, whereby *Mellers* could, either before or after the mortgage security was so given, get or obtain coal equivalent to the whole of the rent paid and the 760l. secured to the lessors.

The bill prayed an account of the coal raised, and of the money paid by the lessee, and that the balance due to the lessee might be repaid and the security delivered up.

To this bill the Defendants demurred.

Mr. *R. Palmer* and Mr. *Currie*, and Mr. *Lloyd* and Mr. *Townsend*, in support of the two demurrers.—The bill discloses no equity which entitles the Plaintiffs to open the accounts, and to recover back money voluntarily paid, *Kemp v. Pryor* (a); and even upon the statements in the bill, there has been nothing over paid. There is a positive covenant to pay for four acres yearly, and the Court cannot release the tenant from that obligation, *Phillips v. Jones* (b), any more than it can from the payment

(a) 7 Ves. 237.

(b) 9 Sim. 519.

payment of rent, where, by accident by fire, the thing demised has been destroyed, *Leeds v. Cheetham* (a). There is no complication of accounts to warrant the interposition of a Court of Equity, for the figures are simple and are stated in the bill, *Dinwiddie v. Bailey* (b). The Plaintiffs are also barred by the lapse of time.

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Mr. *Roupell* and Mr. *Busk*, in support of the bill. The case cannot properly be determined on demurrer, for the Plaintiffs are entitled to some equitable relief. The contract has been entered into and the over-payments made, under a mistake as to the quantity of coal to be worked, and by the peculiar form of the lease the over-payments could not be ascertained until the determination of the term, for until that time, the ultimate deficiency could not be ascertained, nor could it be determined that the mine had been exhausted. Inevitable circumstances have prevented the lessee working the due quantity of coal during the term; and this error and mistake are a good ground for relief. Secondly.—The covenant extended only to that which was demised, namely, the coal which could be laid dry, and the covenant to pay for four acres annually is not absolute, but modified by the right to recoup any deficiency in the subsequent years. The reddendum is for the coal gotten, and when that had been exhausted the rent ought not to have been exacted. The object was to secure the diligent working of the mine, and a royalty on the produce. If the lessors receive a royalty on all that could be got, that is all that they were entitled to, *Smith v. Morris* (c). Thirdly.—The accounts are necessarily complicated, and remained open until the end of the term; besides this, mines form an exception

(a) 1 Sim. 146.

(b) 6 Ves. 136.

(c) 2 Bro. C. C. 311.

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ception to the general rule, that accounts must be of a complicated nature in order to give this Court jurisdiction, *Pulteney v. Warren* (b). The Plaintiffs have come within six years, and therefore are not barred by laches or lapse of time. Fourthly.—The bill alleges over-payment, and that a large balance is due to the Plaintiffs; this is admitted by the demurrer, and is a sufficient ground for overruling it.

*The MASTER of the ROLLS.*

I am of opinion that these demurrers must be allowed; and I arrive at that conclusion upon the construction of the lease, without considering any other point. That question can not only be properly determined on demurrer, but I consider it the right time and most convenient mode of determining a question of this description. It is admitted that the Plaintiffs must be bound by the covenants which they have entered into; but it is argued, on their behalf, that according to the real construction of this lease, it was a demise of a certain quantity of coal, with a reservation of a right in respect of the coal which should be gotten, and that the demise was made under a mistake as to the amount of coal; that the fact could not be discovered until after the determination of the lease; and therefore, this Court will grant relief to the lessee. I do not concur in that view. That the lease was granted in ignorance of the amount of coal under the surface there can be no doubt; but such is the case in all mining leases: it is always a speculation, both the lessor and the lessee are equally ignorant of the amount of coal which may be gotten, and they provide for those circumstances.

I am

I am of opinion, therefore, that it is not a question of mistake, but that you must look at the terms on which the lease has been granted. As I read the lease, the lessee does not covenant to pay for the amount of coal which he shall get, but he expressly covenants that he will pay for a certain amount of coal "whether the same should be got or not." That covenant neither compels the lessee to work two acres of hard coal, nor two acres of *Dunshill* coal; but if he pays the rent, he may, if he thinks fit, decline working altogether. There is no covenant that he shall work the coal, but there is a covenant that he shall pay for a certain amount of coal whether he works it or not. If that be so, it is not necessary to look any further into the lease, or to see whether he has worked, or could or could not have worked, that quantity. There is another covenant, which seems to anticipate that it might not be possible to get the quantity of *Blackwell* coal demised. It is this:—If *Mellers* could not "sell" the whole of the *Blackwell* hard coal thereinbefore covenanted to be gotten, he may get so much more of the *Dunshill* coal as will make up the said yearly rent of 360*l*. It is manifest, that if he could not get the coal he could not sell it, and if he could not sell it, this clause would operate. The next clause makes the matter perfectly clear. It provides for the only case in which the lease is to cease, which is, if the coal should be exhausted before the expiration of the term; and that is not asserted in the bill. The lease therefore continued, and the lessee was bound to pay 360*l*. a-year whether he got the coal or not. The result is, that it appears perfectly clear, that the lessee is bound by that covenant to pay, and being bound to pay, he does not allege, that he has paid more than the number of acres he was to pay for, and therefore no question can arise as to the amount to be repaid.

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This case does not resemble *Smith v. Morris*, where the lessee said, "I will give you all the benefit just as if I worked the coal, but do not compel me to work it in a manner which is perfectly ruinous to me." This is not a question whether before the expiration of the lease the lessee could have said, "The expense of working this mine is so great, that I am willing to pay the total amount which might be got by working it according to this lease, but I require not to be compelled to work it:" but the lessee waits until after the expiration of the lease; he takes the chance of working the coal to an advantage until the end of the term, and then says, "It has turned out differently from what I expected, and therefore I ask now to be recouped." It might as well be argued that the lessors might say, "This mine has become more profitable, and the working much more easy than we expected; you must therefore give me something beyond what the lease stipulates, and what you would have given, if it had been known how easy the working would have been, and how profitable would have been the result of the speculation."

It is obvious that both parties have precluded themselves from raising any question of that description, and that they entered into a covenant which provided how much was to be paid, and the lessee took the chance of the lease being more or less profitable. The result is, that the demurrers must be allowed.

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1852.

HIORNS *v.* HOLTOM,  
FORTNUM *v.* HOLTOM.

ON the 27th of *October*, 1840, *Robbins* executed a mortgage in fee, for securing 1,000*l.*, and in 1842, *Robbins* being in want of a further advance, applied to his solicitor, *Handley*, to procure it. *Handley*, who was also the solicitor of *Holtom*, arranged that he, *Holtom*, should advance the 1,000*l.*, and he prepared a second mortgage for 1,000*l.* from *Robbins* to *Holtom*, dated the 16th of *February*, 1842, which was executed by *Robbins*. *Holtom*, however, objected to a second mortgage, and it was then arranged, that he should pay off the first mortgage and then take a first mortgage for 2,000*l.*

Accordingly, by indenture of the 28th of *February*, 1842, the mortgagor and first mortgagee conveyed the estate to *Holtom* in fee, subject to redemption on payment of 2,000*l.* On the 1st of *July*, 1842, *Robbins* mortgaged the property for 500*l.*, subject to the indenture of the 28th of *February*, 1842. This mortgage was vested in *Hiorns*.

The mortgage deed of the 16th of *February*, 1842, which had been executed but not acted on, was dealt with in the following fraudulent manner:—*Handley*, the

*Nov. 22, 23.*  
*A.* executed a mortgage to *B.* for 1,000*l.*  
This was not acted on, but *A.* afterwards executed another mortgage for 2,000*l.* to *B.* The solicitor employed retained the first deed, and afterwards fraudulently induced *B.*, without consideration, to sign a memorandum, undertaking to transfer the first mortgage to *C.*, and he executed such transfer. *C.* on the faith of *B.*'s acts, advanced 1,000*l.*, which was received by the solicitor and misapplied. Held, that *B.* must be postponed to *C.*

DATES.

|                                                                       |                                                                                       |
|-----------------------------------------------------------------------|---------------------------------------------------------------------------------------|
| 1842, <i>Feb.</i> 16. Mortgage for 1,000 <i>l.</i> to <i>Holtom</i> . | 1844, <i>Mar.</i> 13. <i>Holtom</i> 's agreement to transfer to <i>Mrs. Fortnum</i> . |
| 1842, <i>Feb.</i> 28. Mortgage to <i>Holtom</i> , 2,000 <i>l.</i>     | 1848, <i>Mar.</i> 1. Transfer by <i>Holtom</i> .                                      |
| 1842, <i>July</i> 1. Mortgage to <i>Hiorns</i> , 500 <i>l.</i>        |                                                                                       |

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the solicitor, retained it in his hands uncanceled for the purpose, as he alleged, of obtaining the stamp duty; but in *March*, 1844, he fraudulently procured the signature of *Holtom* to a memorandum by which *Holtom* undertook and agreed to assign to Mrs. *Fortnum* the indenture of mortgage of the 16th of *February*, 1842, "for securing the sum of 1,000*l.* to him." *Handley* then procured 1,000*l.* from Mrs. *Fortnum*, on the security of this agreement to transfer the delivery of the mortgage deed, which sum he applied to his own purposes. *Handley* afterwards fraudulently obtained *Holtom's* signature to a deed, dated the 1st of *March*, 1848, by which, after reciting the mortgage of the 16th of *February*, 1842, *Holtom*, in consideration of 1,000*l.* expressed to be paid in discharge of the mortgage debt secured to him by the recited deed, transferred the mortgage debt secured to him by the indenture of the 16th of *February*, 1842, and the mortgaged premises, and all his estate, &c. to trustees, for Mrs. *Fortnum*.

In these two suits, which were for foreclosure and redemption, questions arose as to the priorities of the several mortgage securities.

Mr. *Lloyd* and Mr. *J. V. Prior*, for *Hio* (sic), contended, that the only sum prior to him was the 1,000*l.* advanced by Mrs. *Fortnum*, and not the additional sum of 1,000*l.* fraudulently obtained from Mrs. *Fortnum*.

Mr. *Bird*, for a party in the same interest, contended that the legal estate did not pass to the trustee Mrs. *Fortnum* by the deed of the 1st of *March*, 1848, but that if it did, the transferee was a trustee for the mortgagee, as nothing was really due on the mortgage at the time it was reported to be transferred.

Mr. *R. Palmer* and Mr. *W. M. James*, for Mrs. *Fortnum*, contended, that the legal estate passed by the deed of 1848, which could only be taken away upon payment of what was due; and secondly, that the conduct of *Holtom* had been such as to postpone him to Mrs. *Fortnum*, upon whom he had enabled his own solicitor to practise a fraud.

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*HIORNS*  
*v.*  
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*v.*  
*HOLTOM.*

Mr. *Field*, for parties in the same interest.

Mr. *W. T. S. Daniel* and Mr. *Rodwell*, for *Holtom*. The mortgage of the 16th of *February*, 1842, and its transfer by the deed of *March*, 1848, are void at law. *Handley* was as much the solicitor of Mrs. *Fortnum* as of *Holtom*, and she, not having the legal estate, is the party who must suffer from the consequences of the fraud.

Mr. *Roberts* and Mr. *H. C. Jones*, for other parties.

The following authorities were referred to, 6 *Bacon's Ab. tit. Release* (a); *Ramsden v. Hylton* (b); *Kennedy v. Green* (c); *Joyce v. De Moleyns* (d); *Thoroughgood's case* (e); *Fausset v. Carpenter* (f).

#### *The MASTER of the ROLLS.*

According to *Holtom's* own statement, he executed the memorandum of 1844 for the purpose of enabling the mortgagor to raise money, and four years afterwards he executed a deed in conformity with his undertaking. He now says, that he did not understand what he was doing, and that the deed in the hands of a person who innocently advanced her money upon the faith of it,  
and

(a) Page 633.

(b) 2 *Ves. sen.* 309.

(c) 3 *Myl. & K.* 699.

(d) 2 *Jones & Lat.* 374.

(e) 2 *Rep.* 9 a.

(f) 2 *Dow. & Cl.* 232.



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and of the memorandum signed by him, is void, tention which has never been admitted in any have met with. In *Kennedy v. Green*, where fraud had been committed, it was conceded, that chaser for valuable consideration would be safe, he had actual or constructive notice of the fraud impossible to hold, as between Mrs. *Fortnum* and *Holton*, that the former is to suffer from the fraud latter having executed such a deed as this, which valid on the face of it, must prevail, as no proceeding have been taken to set it aside.

There must be a declaration that Mrs. *Fort* entitled to 1,000*l.*, part of the 2,000*l.* secured mortgage of the 28th *February*, 1842, held in *Holton*.

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#### GOLDSMID's Case.

*In re* The BRITISH and AMERICAN Steam Navigation Company.

Nov. 25.  
 A prospectus was issued for the establishment of a company. *A. B.* took shares and paid his deposit. Afterwards, at a meeting of shareholders, the scheme was greatly varied. *A. B.* was present, but took no part in the matter, and never after in any way interfered. The company was on the new scheme, and failed. Held, that *A. B.* was not a contributory.

IN 1836, a prospectus was issued for the establishment of a company under the above name first line of steam ships was to run between London and New York. The capital was to be half a million in 5,000 shares of 100*l.* each. The first line was composed of two *British* and two *American* steamers and a charter, to limit the responsibility of the proprietors, was to be applied for.

Mr. *Goldsmid* applied for ten shares, and received a letter of allotment on the 8th of *June*, 1836. He paid the deposit of 10*l.* a share on the 19th of *January* following, but he never executed the parliamentary or other contract or deed. The projectors afterwards thought it advisable to change the character of the undertaking, and to unite with a *Liverpool* company, and the prospectus was revised.

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**GOLDSMID'S**  
*Case.*  
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 Company.

On the 21st of *October*, 1836, a meeting of the shareholders took place, at which the report of the directors was read. By this it appeared, that the arrangement to join the *Liverpool* company had been completed in *June*, on condition of the capital being doubled, and that the vessels should alternately start from *Liverpool* and call at *Cork*. The chairman put the question that the report be passed, which was acceded to *unanimously*. The solicitor read the preliminary deed of the company, which was approved and signed by the directors, and by several proprietors.

By this deed, the object of the company was stated to be, not only a steam communication between *Great Britain* and *America*, but also "between such other **Parts** and places as the directors should think expedient and advisable."

Mr. *Goldsmid* attended the meeting, to learn, as he said, the nature of the arrangements; he objected to them, but did not express his disapprobation. He in fact appeared to have been passive. The company was carried on unsuccessfully upon the terms of the second scheme. On the 30th of *June*, 1838, the directors declared Mr. *Goldsmid's* shares forfeited, and carried the amount to the credit of their stock account, and the 50*l.* paid to profit and loss. As to Mr. *Goldsmid*, it did not

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appear that he had taken any further notice of the company, or had any connexion therewith, but an order having been made to wind up the company, the official manager, in 1852, sought to charge him as a contributory. The Master placed him on the list, and made a call of 65*l.* a share. He now appealed.

Mr. *R. Palmer* and Mr. *Goldsamid*, in support of the appeal. Mr. *Goldsamid* is not properly included in the list of contributories. He agreed to become a shareholder in a company to be formed upon certain principles and for certain purposes. If that company had been formed, he would have been a shareholder; but the projectors have entirely altered the nature and terms of the undertaking. The capital, instead of being half a million, is now 1,000,000*l.*; the number of shares is doubled; the destination of the ships is different, and, instead of a communication limited to that between *London* and *New York*, it is extended to any places the directors may think advisable, that is, over the whole world. Instead of the liability of the shareholders being restricted by a charter, as was proposed, they are indefinite, and rest on a joint-stock deed. When persons agree to become partners, the nature of the trade cannot be altered without the consent and concurrence of every individual partner; *Colman v. The Eastern Counties Railway Company* (a); *Natush v. Irving* (b); *Const v. Harris* (c). The original scheme proved abortive, and Mr. *Goldsamid* has in no way assented to the new one.

Again, the shares have been forfeited, and in 1838, at least, he ceased to be a shareholder, *Ex parte Beresford* (d); and the company are bound by the acts of the directors,

(a) 10 *Beav.* 1.

(b) *Gow on Partnership*, 407.

(c) *Turn. & R.* 496.

(d) 2 *Macn. & Gor.* 197.

directors, *Ex parte Meux's Executors* (a). There is no evidence of his accession to the new company beyond this, that he was present at the meeting of the 21st October, 1836; but he did nothing then or afterwards. He never executed the deed, or took up the shares. He never interfered, and if the concern had turned out profitable he could not have insisted on a share of the profits, *Prendergast v. Turton* (b).

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Mr. Daniel and Mr. Roxburgh, *contra*. A mere allottee of shares is not liable as a contributory if no company be formed; but a party receiving an allotment and paying a deposit is a contributory, although he may not have executed the deed of settlement, *Ex parte Yelland* (c). The company is the same as that to which Mr. Goldsmid subscribed. There are some modifications, which the parties in perfecting the scheme were justified in making, and they were assented to by Mr. Goldsmid at the meeting of the 21st of October, 1836. He never expressed any dissatisfaction or dissent, and allowed his money to remain in the concern, and countenanced the undertaking, and induced others to join it, by permitting his name to remain in it (d). He might, at any time, have required the share of profits attributable to his capital in the concern, and on paying up his calls he might have insisted on his shares.

As to the forfeiture, the deed gives the directors no authority to declare one, as in *Beresford's* and *Meux's* cases. Directors are the mere agents of the general body, and have a limited authority, which they cannot exceed, *Morgan's case* (e). They cannot, by declaring a forfeiture,

(a) 15 *Jurist*, 439.  
(b) 1 *Y. & Coll. C. C.* 98.  
(c) 16 *Jurist*, 509.

(d) See *Davidson's case*, 3 *De G. & Sm.* 21.  
(e) 1 *Macn. & Gor.* 225.

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**tion Company.**

feiture, release one shareholder from his liabilities to the prejudice of the rest. The company having come to an end in 1841, the transaction is now to be regarded as at that period.

*The MASTER of the ROLLS.*

I think the Master has miscarried in putting Mr. *Goldsmid's* name on the list as a contributory.

A scheme was formed in the beginning of 1836, and on that scheme and prospectus Mr. *Goldsmid* applied for and obtained ten shares, upon which he afterwards paid a deposit. Subsequently the scheme of the company was altered, and in *October*, 1836, a meeting was held, at which a statement of a new scheme was made, enlarging and extending the views of the company. This was carried into effect, and on that, a deed was executed, and a company was formed on the enlarged scheme. It is contended that Mr. *Goldsmid's* contract for the first scheme bound him to the second. He had contracted for a particular company, and if that had been formed he would have been a member of it; but it was never formed.

But then, it is said, that Mr. *Goldsmid's* presence at the meeting of *October*, 1836, bound him. I will first consider the effect of Mr. *Goldsmid's* being present at this meeting, supposing that had been the only act done by him. There would in that case have been a meeting for the purpose of forming a company, at which *Goldsmid* was present, and heard the proposal. It is put to the meeting that this company shall be formed, and it is stated, that it was carried unanimously; that is, no one expressed any dissent. Mr. *Goldsmid* never applied for shares in this company, and he never received  
any

any share or scrip in it; and if this had been all, he would not be a member. It is difficult to see how two acts, neither of which would alone have that effect, could together make him a member of a company. It is said that the second undertaking was based on the former, and to some extent incorporated in it. It does not appear to me that that is so, or that there is any act by which he can be treated as having entered into a contract to transfer his liability to take shares in the original company into an obligation to take shares in a different scheme and in a different company.

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I can conceive that a person may be present at a public meeting, and thinking he has no concern in the matter may not consider it necessary to express any dissent. He may simply go away from the meeting, making no application for shares, and taking none; and I do not find anything which requires subscribers to the old company to become subscribers to the new.

I think it unnecessary to go into the question of the forfeiture of shares; but if this company had been as successful as it has been unfortunate, Mr. *Goldsamid* would have attempted in vain to get any profit, and if he had sought, he certainly would not have obtained, the aid of this Court to compel the company to render to him an account of their profits. Whether he could have got back his deposit is another question. In my view he could, if he had applied for it in proper time.

The result is, that Mr. *Goldsamid* must be struck off the list of contributories.

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1852.

## PERKINS v. EDE.

Nov. 25.  
Costs to which  
a purchaser  
under the  
Court is en-  
titled, on its  
being found  
that a good  
title cannot be  
made.

AN estate was sold in the suit, but, on a reference to the Master, it was found, that the title was defective, and on exceptions the Master's finding was affirmed.

The purchaser now asked to be discharged from his purchase, and for payment of his "costs, charges, and expenses."

The question was, what costs the purchaser was entitled to.

Mr. *R. Palmer*, Mr. *A. Lewis*, and Mr. *Shebbeare*, for the different parties.

*Lewis v. Lewis (a)* was referred to.

*The MASTER of the ROLLS.*

Take the usual order.

(a) 9 *L. J. (N. S.) Ch.* 176.

## ABSTRACT OF ORDER.

Discharge the purchaser and tax his costs, charges and expenses properly incurred, occasioned by his bidding for and becoming the purchaser of lot 3, and also his costs of the reference as to title, and of all proceedings consequent thereon, including his costs of and occasioned by the Plaintiff's exceptions to the Master's report and the order thereon, and of this application and consequent thereon; and direct payment out of the fund in Court. *Reg. Lib.* 1852, *B.* fol. 167.

1852.

## WIGLESWORTH v. WIGLESWORTH.

Dec. 1.

**B**Y a settlement dated in 1827, a sum of 3,000*l.*, 4*l.* per cents. was vested in Mr. *Thomas Wiglesworth* and Mr. *Bullock*, upon trust (subject to the prior life estate) for the Plaintiffs, the children of *Elizabeth*, the wife of *Thomas Wiglesworth*. The deed contained a power to vary the securities, and to invest in real or government, or sufficient security.


Two trustees, having power to alter and vary a trust fund, sold it out for that purpose, but allowed the produce to be received by one alone. Held, that the other, who failed to show that the fund was properly invested, was bound to pay the amount into Court.

*Thomas Wiglesworth* had died, and this bill, filed by his children against *Bullock* and others, stated, that there was no sum of stock now standing in the name of the trustees to answer the sum of 3,000*l.*, nor was there any other investment of the same, but the said trust fund had been in some manner misapplied, so as not to be now forthcoming, and the said trust fund was in fact sold out by *Bullock* and *Wiglesworth* deceased, both concurring in the breach of trust.

It prayed a declaration, that the trustees were liable to make good the 3,000*l.*, 4*l.* per cents., "or such a sum of money as was produced by the sale thereof;" that they might be decreed to make it good, and for the appointment of new trustees.

*Bullock*, by his answer, stated, that shortly before the 20th of March, 1835, with a view to exercise the power to vary securities, he executed a power of attorney to Messrs. *Child*, to sell the trust fund, and requested them to sell and deal with the proceeds, according to the order of *Thomas Wiglesworth*, and he believed the fund



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fund had been sold, and the produce, 2,992*l.*, had been carried to *Thomas Wiglesworth's* credit. He attempted to make out that the fund, or part of it, had been laid out on mortgage, but in this he failed.

A motion was now made, on behalf of the Plaintiffs, that *Bullock* might pay the fund into Court.

Mr. *R. Palmer* and Mr. *W. M. James*, in support of the motion, relied on *Collis v. Collis* (a); *Vigrass v. Binfield* (b).

Mr. *Lloyd* and Mr. *Bush*, *contrà*. The Plaintiffs' right to have the money paid into Court must proceed on the admission of an equity stated in the bill, and not of another equity, *Proudfoot v. Hume* (c). Here the breach of trust, alleged by the bill, is the selling out of the fund, and not its subsequent application. That equity is displaced, for the deed contains a power to vary the securities, and the fund was sold out for that purpose. In a similar case of *Meyer v. Montriau* (d), where there was an admission of the sale of a trust fund, but no admission of its misapplication, payment into Court was refused. The Plaintiffs, whatever may be their rights at the hearing, are not, on a record framed like the present, entitled to an order compelling the Defendant to pay the amount in contest into Court.

*The MASTER of the ROLLS.*

I am of opinion that the money must be paid into Court. The case is this :—Certain persons entitled to 3,000*l.* stock, in remainder, seek a declaration, that the trustees have committed a breach of trust in selling it out;

(a) 2 *Sim.* 365.  
 (b) 3 *Mad.* 62.

(c) 4 *Beav.* 476.  
 (d) *Ibid.* 343.

out; and ask that the fund may be paid into Court, in order that it may be secured for the benefit of the *cestuis que trust*, and be applied according to the trusts of the settlement. The bill therefore seeks the execution of the trusts of this sum of money, and by this motion the Plaintiffs ask, that the fund may be secured, in the first instance, until the Court is able to execute the trusts of that indenture.

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WORTH  
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WORTH.

It is every day's practice for the Court to secure a fund until the hearing, when the trusts are to be performed. But it is said, that the Court will not order payment into Court, except on an admission in the answer. Here the answer admits the existence of the fund, its sale by the Defendant, and the transfer of the produce to the sole account of the deceased trustee. The next objection is, that the Plaintiffs are bound by their pleadings; that they must distinctly allege the breach of trust; that here the alleged breach of trust is the sale of the fund, but the one now relied on is the improper application of the produce. I admit that a Plaintiff must state his case upon the record, but I do not consider that rule or the decision in *Proudfoot v. Hume* applicable to the present case. If so, it would lead to this result, that if a sole trustee, having a power to vary the securities, were to sell out the trust fund and put the produce into his own pocket, the Court could grant no relief, if the breach of trust alleged were the improper sale by the trustee and not the misapplication of the produce. The answer however is, that all this constitutes but one act, by which the trustee improperly gets possession of the fund, and that if a trustee sells out a trust fund with the view of misapplying it and not for the purpose of changing the securities, the sale is as much a breach of trust as the putting the produce into his own pocket and spending it. The effect of yielding

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to such an argument would be, to render it impossible for the Court to deal with a case of this description, and to introduce into equity pleading a greater degree of refinement than has ever been allowed.

Here there is a power to vary the securities. The two trustees joined in giving a power of attorney to the bankers to sell out the stock, and they directed the produce to be placed to the sole account of one of them. This act of itself, giving one trustee the sole and absolute control over the fund, was a breach of trust.

The case of *Meyer v. Montrieu* does not apply, because in that case Lord *Langdale* went on the ground, that there was no admission that the money had been misapplied. Here there is a distinct admission that the money has not been properly applied, and consequently that it has been misapplied.

I am of opinion that the trustee having sold out this fund in 1835, and having allowed the produce to come to the hands of his co-trustee, without seeing that it was duly invested on proper securities, as directed by the power, must be treated in the same manner as if the money had been sold out and received by him and not properly invested. He is bound, therefore, to bring the produce of the fund into Court, by way of security, until the Court can execute the trusts of the settlement.

The principle I have always acted on in all cases of unsettled account is this:—that there must be a distinct admission that there is a fund which can be brought into Court. There is such an admission in this case, and an admission that the money has not been properly invested. The *cestuis que trust* are therefore clearly entitled to have this fund secured until the trusts can be duly executed by the Court.

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NOTE.—Affirmed by the Lords Justices.

1852.

CLARK v. MAY.

**M**ESSRS. *Anthony* and *Robert Edmonds*, being in embarrassed circumstances, conveyed their property to the Defendants, *May* and another, as trustees for their creditors. The trustees had vested in them two fourth parts of a freehold property, and also a judgment recovered by them against *K.* and *E.* for breach of a contract entered into by *K.* and *E.* to purchase the freehold property, but which contract they (*K.* and *E.*) had abandoned.

Dec. 2, 3.

The Plaintiff by one contract purchased an estate and a judgment for 1,000*l.* Held, that he was entitled to apportion the purchase-money between the estate and the judgment, and to have separate conveyances of each.

In a frivolous suit, costs given to neither side.

The trustees sold the freehold and judgment together to the Plaintiff for the sum of 1,000*l.* The title being accepted, the Plaintiff prepared two conveyances, one of the freehold and the other of the judgment debt, and he apportioned 800*l.* of the purchase money as the price of the freehold, and 200*l.* as the price of the judgment. The vendors declined executing these deeds, and the judgment being, as they alleged, valueless, they objected to anything but a nominal or some small consideration being expressed as the purchase money of the judgment. They said, that the value of the judgment would, under the circumstances, be distributable amongst the separate creditors, and not by the trustees amongst the joint creditors of *Anthony* and *Robert Edmonds*. The Court, however, held the contrary, and it is therefore unnecessary to state the circumstances upon which that contention was founded.

The purchaser filed a bill for specific performance, and the only question was, as to the form of the conveyance.

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MAY.

Mr. *R. Palmer* and Mr. *W. R. Ellis*, for the Plaintiff. A purchaser has a right to such a conveyance as will be most convenient to himself and his title, provided he does not impose on the vendor any unreasonable trouble. Thus, if two properties are held under different titles, or are situated in different counties, the purchaser might require separate conveyances of each. He is entitled also to distribute his purchase money, if he can thereby lessen the amount of the *ad valorem* duty, *Sugden's Concise View* (a); and the Stamp Act itself provides (b), that the purchase money shall be apportioned. Here it is of importance to the title to keep the estate and judgment separate, and no injury will be done to the vendors, for the right to the estate and to the judgment (which is a collateral security for the value of the estate) are identical. They cited *Warren v. Howe* (c).

Mr. *Roupell* and Mr. *Hardy*, *contrà*. Under one contract and at one price, a purchaser, in strictness, is entitled only to one conveyance. He has no right to split the contract into as many as he pleases, and expose the vendors to the extra expense and trouble of perusing and executing an unlimited number of conveyances. Here the vendors would be prejudiced, for the judgment is of no value, but the produce would belong to the separate and not to the joint creditors. If, therefore the trustees were to acknowledge that they had received 200*l.* as the consideration for the judgment, they would be personally liable for that sum to the separate creditors, in case they paid it over to the joint creditors, or at least exposed to the costs of proving the actual contract. Nothing would be gained by the purchaser as to duty by having two deeds executed.

Mr

(a) Page 427, pl. 10.

(b) 55 *Geo.* 3, c. 184, and 13

& 14 *Vict.* c. 97.

(c) 2 *Barn.* & *Cr.* 280.

**Mr. R. Palmer**, in reply.

*The MASTER of the ROLLS.*

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MAY.

This is, on both sides, as idle a contest as I ever knew brought into a Court of justice. As far as I have been able to understand the matter, no injury would have arisen to either party by having the conveyance in one form or the other. With respect to the form required by the Plaintiff, it is resisted, on the ground that there may be separate creditors of *Anthony*, who would be entitled to the produce of the judgment, or might put the vendors to some expense in proving that they are not entitled to it. It appears to me, however, that *Mr. Palmer's* answer is conclusive. This was a sale of property, and the judgment was merely a security for the price, and *Anthony's* interest in the property was the same as in the judgment, and his creditors would really be entitled to both.

I am equally unable to understand, why it is that the Plaintiff wanted to have the purchase money apportioned. It has not been satisfactorily made out to my mind, that there would have been any diminution in the expense of the stamps. [*Mr. Roupell*.—The extra deed stamp would make it larger.] At all events, that ground was not put forward by the Plaintiff when this contest arose. Neither do I understand, how it would have been possible to have avoided showing the title of *King* and *Edmonds* (the former purchasers) upon the abstract of title hereafter, or how it was important that it should be conveyed by two separate deeds. However, it might undoubtedly be done by separate deeds, if it had been thought desirable. The two solicitors evidently get into a contest: one resolves on doing nothing to accommodate, and the other immediately goes and files a bill, and

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and the time of the Court is taken up in discussing a question which ought never to have been brought up.

The result, in my opinion, is, that the Plaintiff is entitled to a decree to have the conveyance in the fee made for it, but the Court will give no costs on either side.

## SOUTHERN v. WOLLASTON.

Dec. 11.

A gift of a legacy to *A.* for life, and afterwards to pay and divide it amongst all his children who shall attain the age of twenty-five, is not too remote, if, by the death of *A.* at such a time before the testator, all the children must necessarily attain twenty-five within twenty-one years after the testator's death.

THE testator, by his will dated in 1835, bequeathed 400*l.* consols to trustees, upon trust for his son *Edward Wollaston* for life; and after his decease, upon trust to assign and transfer, or pay, distribute and divide the same *unto and equally between all and every child or children and child of Edward Wollaston* who shall be living at his decease, and *who should then be of or upwards live to attain the age of twenty-five years*; in equal shares, if more than one, in equal shares.

There was a gift over, in case there should be no child living at his death, or of their all dying under twenty-five. And the testator directed, that after the death of *Edward Wollaston*, and while any of the persons so sumptively entitled thereto should be under the age of twenty-five years, the dividends of the shares of the consols should be paid to the persons so, for the time being, under that age 400*l.*, should be applied towards the maintenance and education of the person to whom the said stock was

## DATES.

1835. Will.  
1837. *E. W.* died.  
1845. Testator died.

1848. Youngest child attained  
twenty-one.

**should**, for the time being, under his will presumptively **belong**.

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The testator died in 1845. Previous thereto, and in 1837, the legatee *Edward Wollaston* had died, leaving eleven children; four only survived the testator, and the youngest attained twenty-five in 1848.

A question was raised, at a former hearing (*a*), whether this gift to the class of children was or was not void for remoteness; and the point not having been fully argued, the impression of the Court then was, that it was void, but permission was obtained to argue the point.

Mr. Lloyd and Mr. Bilton now appeared for the children. They argued as follows:—The will speaks as at the testator's death. This legacy is therefore free from all objection in regard to remoteness, for the tenant for life was then dead, and his children ascertained; and as they were all more than four years of age the legacy of necessity vested within due limits, that is, within twenty-one years from the testator's death. In *Williams v. Teale* (*b*) Sir James Wigram expressed his opinion on the very point. He says, "A third point, upon which my mind is also made up, is this:—that, in considering the validity of the limitations in this will, with reference to the state of the testator's family, the state of the family must be looked at, as it existed at the time of the death of the testator, and not as it existed at the date of the will. If a testator should give his property to A. for life, with remainder to such of A.'s children as should attain twenty-five years of age, and the testator should die, living A., there is no doubt but that the limitations over to the children of A. would be void, *Leake v. Robinson* (*c*); but, if, in that case, A. had died living the testator,

(*a*) *Ante*, 166.

(*b*) 6 *Hare*, p. 251.

(*c*) 2 *Mer.* 363.



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testator, and at the death of the testator all the children of A. had attained twenty-five, the class would be then ascertained, and I cannot think it possible that any Court of justice would exclude them from the benefit of the bequest, on the ground only, that if A. had survived the testator, the legacy would have been void, because the class in that state of things could not have been ascertained."

Mr. R. Palmer, Mr. Rogers, Mr. Roupell, Mr. Rendall, Mr. Shebbeare, Mr. Bird, Mr. Sheffield, and Mr. Thring, for other parties.

*Leake v. Robinson*(a); *Buffar v. Bradford*(b); *Vanderplank v. King*(c); *Doe d. Evers v. Challis*(d); *Leuouis on Perpetuities*(e); *Harris v. Davis*(f).

The MASTER of the ROLLS said he should follow the case of *Williams v. Teale*, and declare that the gift to the children was not void for remoteness.

(a) 2 Mer. 363.  
 (b) 2 Atk. 220.  
 (c) 3 Hare, 1.

(d) Q. B. Dec. 1850.  
 (e) Appendix, 27, 28.  
 (f) 1 Collyer, 424, 425.

1852.

MACLAREN v. STAINTON.

**T**HE testator, *Henry Stainton*, died in *December*, 1851. He had considerable real and personal property both in *Scotland* and *England*. At his death he was domiciled and resident in *England*, where he had for many years been the agent of the *Carron Company*.

The Plaintiffs, *Maclaren* and *Dawson*, and the Defendant, *H. T. Stainton*, were the acting trustees and executors of his will in *England*. The Defendant *Stainton* alone had proved his will in *Scotland*.

The Plaintiffs instituted this suit on the 8th of *May*, 1852, for the administration of the estate, and they obtained the ordinary decree for taking the accounts, and for ascertaining and paying the testator's debts. A debt of about 100,000*l.* was claimed to be due from the testator by the *Carron Company*, of which he was the English manager, and a shareholder to the extent of 80,000*l.* The *Carron Company* was a Scotch corporation, incorporated, in 1773, by royal charter, under the union seal of *Scotland*, for manufacturing iron at *Carron*, in *Scotland*. It had offices, warehouses and agents in *London* and *Liverpool*, and goods and property there. After the decree, and on the 29th *October*, 1852, the *Carron Company* commenced proceedings in

Dec. 4, 5.  
After a decree for administration, a Scotch corporation, trading in *England*, and having warehouses and assets there, proceeded in *Scotland* against the testator's Scotch assets. Held, that this Court had jurisdiction to restrain it, and that the case was a proper one for its interference.

Service of a notice of motion on a Scotch company, not party to the suit, at its office in *London*, held good.

A Plaintiff applying for an injunction should fairly state his case, both where the application is *ex parte*, and where, on no-

tice, the opponent does not appear; but the Court does not hold him so strictly to the rule in the latter case as in the former.

DATES.

|            |                            |                                             |
|------------|----------------------------|---------------------------------------------|
| 1851.      | Death.                     | 1852, Oct. Proceedings in <i>Scotland</i> . |
| 1852, May. | Decree in <i>England</i> . | 1852, Nov. Injunction.                      |

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*Scotland* against the trustees and executors of the will, for the recovery of their debt, and they obtained letters of inhibition and arrestment, which, in effect, attached the testator's personal estate in *Scotland*, and prevented the sale of his Scotch real estate, except subject to the company's claim, and it rendered both the real and personal estate available for payment of the debt of the *Carron* Company, when established by decree. But any other creditor might institute a process of "multiple poinding and exoneration," by which, in effect, the estate would be administered, and the claims of all the creditors provided for. Upon this, the Plaintiffs, after some correspondence, served the manager of the *Carron* Company, at their office in *London*, with a notice of a motion for an injunction to restrain the company from proceeding in their Scotch suit. The company were not parties to the English suit, and did not appear on the motion, whereupon the injunction was granted on 15th of *November*, 1852, in their absence.

A motion was now made, on behalf of the *Carron* Company, to dissolve the injunction; or that the company might proceed, so far only as might be necessary for the purpose of having their claim adjudicated on, and of obtaining security to answer what might be found due to them.

Mr. *Willcock* and Mr. *Cotton*, in support of the motion. First, the Court has no jurisdiction to grant an injunction in the present case. "Jurisdiction, to be rightly exercised, must be founded either upon the person being within the territory, or upon the thing being within the territory;" for "no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decision. Every exertion of authority of this sort, beyond  
this

**this** limit, is a mere nullity, and incapable of binding **such** persons or property in any other tribunals.”—*Story’s Conflict of Laws* (a). *Scotland*, for this purpose, must be considered as a foreign country, *Whyte v. Rose* (b). Again, where there is property of a testator in two countries, it has been established that “each portion of the estate must be administered in the country in which possession of it is taken and held under lawful authority.”—2 *Williams on Executors* (c); *Preston v. Viscount Melville* (d).

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The present is the case of a Scotch corporation, locally situated or domiciled in *Scotland*, which country is the seat of its operations; the property sought to be affected is also there; and the executors have come within the jurisdiction of the Scotch Courts by proving the will in *Scotland*. These things combined, fix *Scotland* as the proper *forum* for adjudicating on the questions raised by the Scotch suit. The mere accident of the company’s having an office and an agent here, is not sufficient to withdraw, from an independent foreign tribunal, of competent jurisdiction, the right of determining questions as to property within its jurisdiction.

If it were otherwise, the circumstance of a Russian or other foreign merchant, or a West India proprietor, having an agent in this country for the sale of his merchandize or produce, would have the effect of depriving him of his right to appeal for redress to the courts of his own country. As to the real estate, the Scotch courts have exclusive jurisdiction. “Lands in the plantations are no more under the jurisdiction of this Court than lands in *Scotland*, for it [the Court] *agit in personam*,”

(a) Sect. 539, p. 786.

(b) 3 Q. B. Rep. 508.

(c) 4th edition, p. 1414.

(d) 8 Cl. &amp; Fin. 1.

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This Court has no power over a Scotch corporation to enforce obedience, except as against any property accidentally to be found here. The case is not like that of an individual, who might be committed, in case he disobeyed the injunction.

The obligation to obey an injunction is merely personal, and no other Court regards it. In *Vigers v. Lord Audley(b)*, Lord Cottenham granted an injunction to restrain proceedings in *Ireland*. The party nevertheless proceeded and recovered; and the House of Lords, on appeal, supported him, and gave him the estate, although he had acted in defiance of the English injunction. *Smith v. The Earl of Effingham(c)*, also illustrates this doctrine. Courts of law would disregard a judgment obtained against a party out of the jurisdiction of the Court making it, *Buchanan v. Rucker(d)*; and they have held, that an Irish railway company is not amenable to its process, though there be directors here; *Evans v. Dublin and Drogheda Railway Company(e)*.

Secondly.—If this Court has jurisdiction, this is not a proper case for its exercise. In these cases the Court weighs the conveniences and inconveniences, *Jones v. Geddes(f)*; *Kennedy v. The Earl of Cassillis(g)*; and there being questions of Scotch law to decide, it will be far more convenient to determine them there than in *England*.

(a) 1 *Atk.* 543.

(b) Reported on other points, 8 *Sim.* 333; 9 *Sim.* 408, and 2 *Myl. & Cr.* 49.

(c) 10 *Beav.* 589.

(d) 9 *East*, 192.

(e) 14 *Mec. & W.* 142.

(f) 1 *Phillips*, 724.

(g) 2 *Swanst.* 313.

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*England*. Again, the course of administration of the real and personal estate may be different in *Scotland*. On what ground, then, ought this Court to interpose, and prevent an independent and competent foreign tribunal from deciding the rights of those of its own nation to property within the limits of its own jurisdiction? A creditor ought, at all events, to be allowed to proceed to the extent of obtaining security, as in *Wedderburn v. Wedderburn* (a). The Court, in exercising its jurisdiction to prevent a party pursuing his own remedies, always inquires whether the decree will give him all he asks in his own suit; The Earl of *Portarlington v. Damer* (b). Here it evidently will not; and the other Scotch creditors, having no agents in this country, may, if the Scotch suit of the *Carron Company* be stayed, proceed in defiance of any decree or order this Court may make, and thus obtain an advantage, by their diligence, over the *Carron Company*. The express provisions of the Act of Union with *Scotland* also furnish reasons, grounded on an international contract, for preventing an English Court intermeddling with a Scotch suit (c).

Thirdly.—The injunction ought to be dissolved in consequence of the irregular way in which the Plaintiffs have conducted their proceedings. They concealed material facts on their application for the injunction. They suppressed the negotiations and correspondence, by which the Plaintiffs acquiesced in the proceedings taken by the company. Again, independent of the statutes, a subpoena could not be served abroad; *Fernandez v. Corbin* (d); *Johnson v. Nagle* (e); nor can an office

(a) 4 *Myl. & Cr.* 585.(b) 2 *Phillips*, 262.(c) 5 *Anne*, c. 8, s. 1, art. 19.(d) 2 *Sim.* 544.(e) 1 *Molloy*, 245.

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office copy of a bill, *Lorton v. Kingston*(a). Here the company are neither parties to the cause nor have they been served with any process; and to bring a Scotch company within the jurisdiction of this Court, by service of a notice of motion on a mere agent here, will be greatly to extend the practice, the principle of which Lord Eldon confessed he did not understand, *Paxton v. Douglas*(b). Service of a notice of motion before appearance is irregular, except by leave, *Hill v. Richmond*(c); and leave of the Court is also necessary to serve a notice of motion out of the jurisdiction, *Green v. Pledger*(d). Why should less be required in this case?

Mr. R. Palmer, Mr. James Anderson, and Mr. Lewis, for the Plaintiffs; and Mr. Roupell, Mr. Giffard, Mr. K. Parker and Mr. Appach, for parties interested under the will, *contra*. This is not the case of a corporation exclusively Scotch; it trades in *England*, where it has warehouses, agents, and real and personal property. It is within the jurisdiction, and liable both to the process of this Court and to the bankrupt laws; *Alexander v. Vaughan*(e); *The Royal Bank of Scotland v. Cuthbert*(f); *Allen v. Cannon*(g). The company might be made a defendant to a suit, and served with process at the house of business, although its *quasi domicil* might be in *Scotland*, as was done in the case of *Davidson v. The Marchioness of Hastings*(h). Again, as a corporation, service of process on one of its members would be sufficient; 1 *Daniell's Chan. Pr.*(i); *Hind*(k). The circumstance of a person being domiciled abroad, or a corporation being foreign, does not prevent this Court exercising

(a) 2 Macn. & G. 139.  
 (b) 8 Ves. 520.  
 (c) 2 Myl. & Cr. 641.  
 (d) 3 Hare, 165.  
 (e) 1 Cowp. 398.

(f) 1 Rose, 462.  
 (g) 4 Burn. & Ald. 418.  
 (h) 2 Keen, 509.  
 (i) Page 564, 1st edition.  
 (k) Page 87.

exercising a jurisdiction over them, if they come to this country, or have property here; *Lewis v. Baldwin*(a); In re the *Forth Marine Insurance Company*(b). But it is not necessary to make a creditor a party to a suit, in order to restrain his proceeding against the assets after decree. The course of practice is, merely to serve him with a notice of motion, to save the expense of making him a party. After a decree like this, he is as it were a party, the decree being a judgment in his favour. The proceeding is analogous, and if the Court has jurisdiction in one case it has equally so in the other. The Court has the means of enforcing its order against this corporation by sequestrating its property here, as it would against an individual by attachment. The cases are numerous in which this Court has restrained proceedings in foreign courts; *Harrison v. Gurney*(c); *Bushby v. Munday*(d); *Lord Portarlington v. Soulby*(e). Even in cases of real estate abroad; *Beckford v. Kemble*(f); *Beauchamp v. The Marquis of Huntley*(g); *Bunbury v. Bunbury*(h).

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Secondly.—It is not the practice, upon an application to stay proceedings at law after a decree, to inquire where it will be most convenient to try the question; an injunction issues, almost as of course, to restrain proceedings at law on a legal demand. But here it would be more convenient to determine all questions in this country, and not allow the company either to create unnecessary expense by two administration suits, or to obtain

(a) 11 *Beav.* 153.

(b) 9 *Beav.* 469, and see *Beattie v. Johnstone*, 1 *Phillips*, 17, and 10 *Cl. & Fin.* 42; *Whitmore v. Ryan*, 4 *Hare*, 612, and *In re the Madrid and Valencia Railway Company*, 3 *De G. & S.* 127; 2 *Macn. & Gor.* 169, and

1 *Hall & Twells*, 597.

(c) 2 *Jac. & W.* 563.

(d) 5 *Mad.* 297.

(e) 3 *Myl. & K.* 104.

(f) 1 *Sim. & St.* 7.

(g) *Jacob*, 546.

(h) 1 *Beav.* 318.



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obtain an advantage over the other creditors of the testator.

Thirdly.—No material fact has been suppressed; and the notice of motion has been served in the usual way in such cases. The Act of Union presents no difficulty; the proceeding is *in personam*, and not by way of appeal from, or prohibition to, the Scotch Court.

Mr. Willcock, in reply.

*The MASTER of the ROLLS.*

Three questions are raised by this motion; first, whether the Court has any jurisdiction to issue an injunction against the *Carron* Company under the circumstances of this case. Secondly, whether if it have such jurisdiction it is fit to exercise it, and if so, under any and what conditions; and, thirdly, whether, under the peculiar manner in which the parties applied for this injunction, they are entitled to retain it.

The first question is one of very considerable importance, and upon that account I have been desirous to hear it fully argued. But from the opening of this motion my opinion has never varied, that the Court has a clear and distinct jurisdiction in this case.

The state of the case is this:—There is a decree of this Court for the administration of the testator's estate, which is a judgment for the benefit of all the creditors. It is not, and cannot consistently with the authorities be disputed, that after such a decree, a creditor residing in this country cannot proceed in a foreign Court, for the purpose of enforcing his claim against the property in that foreign country. But it has been contended,  
 that

that this principle is not applicable to the present case; and that it would be doing that which the Court has never before done, to grant an injunction against a person resident out of its jurisdiction, who has never submitted to it, but who happens to have property within it, which gives the Court the means of enforcing its orders against him. Now that is a proposition of considerable importance, on which I do not mean to express any opinion. The case of *Davidson v. The Marchioness of Hastings* was one of this description. There a domiciled Scotch woman was resident in *Scotland*, but had a house in this country; and it was held, that service at that dwelling house in *England* was sufficient to found a writ of sequestration for non-appearance. But the ground upon which I proceed in this case, and to which that case affords a strong analogy, is this:—Here is the case of a corporation, which has therefore no personal existence. It has its principal and head office out of the jurisdiction of the Court, but it has another office in this metropolis, for the purpose of transacting its business there, and it has an agent there, for the purpose of conducting and managing its business. It may be true, that this corporation has a Scotch charter, and may be called a Scotch company; but I consider it impossible to say, that any corporation so circumstanced is not (if I may use the word) resident at the office, where, in point of fact, it has an agent carrying on business on its behalf, and in its name.

Without referring to the other cases cited, I consider service upon the corporation at that place to be a good service upon the corporation itself, in analogy to the case of *Davidson v. The Marchioness of Hastings*; and it is admitted, that the corporation had, at its head office, full notice of the fact of that notice having been served.

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I am of opinion, that it is established (although Lord *Eldon* says he does not know how the jurisdiction arose in the first instance) that where a decree has been made for the administration of an estate, it is not necessary to file a bill against a creditor who does not come in, in order to obtain an injunction to prevent him from applying to any other tribunal for the purpose of enforcing his right. Notice of the decree is all that is necessary; and if the party will not submit to it, this Court will enjoin him from proceeding in the tribunals either of this or of any other country.

Here is a corporation, which, for various purposes, have an office in this country, and is as much within the jurisdiction of the Court, for this purpose, as in any of the cases cited; and I will only refer to *The Forth Marine Insurance Company (a)*, which shows, that the Court exercises jurisdiction over Scotch companies having offices in this country. That being so, I am of opinion that the Court has jurisdiction.

The next question is, whether it is fit and proper that the Court should exercise that jurisdiction. I have attended very carefully to the affidavits, respecting the nature of the proceedings in *Scotland*, and it appears to me, from the statement on both sides, that they are such, that the creditors in this country must necessarily adopt one of two courses. They must either submit to allow the *Carron Company* to sweep off the whole Scotch assets, and be excluded from a participation in them, or they must institute proceedings in *Scotland*, which would, in fact, be a suit for the purpose of administering the estate of the testator between the same persons, upon the same terms, and upon the

(a) 9 *Beavan*, 469, and 1 *De Ger*, 335.

the same principle, as that on which this Court is now administering it. If the English creditors proceed in *Scotland*, they must have their rights, as between themselves and the testator, determined by the Scotch Courts and upon the principles of the English law; and thus their claims would have to be established in both countries. I am of opinion that this would occasion a considerable injury to this estate, and loss to the parties entitled to the residue.

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It is then suggested, that there are various other reasons why this Court should not interfere. One of those is, that there are or may be questions of Scotch law to be determined; and it would, undoubtedly, be very inconvenient for this Court to determine the law of another country, as a question of fact; but upon the balance of inconvenience, I think that it is better to confine the proceedings to the suit here, for otherwise the Scotch Courts would have to determine questions of English law, exactly in the same manner, with the additional expense of two suits substantially for the same object. Another reason which has been urged why the matter should not be stopped is this:—It is said, there may be other creditors in *Scotland* who have no property or residence in this country; and that if they should institute proceedings in *Scotland* for the same purpose, this Court, being powerless and utterly unable to restrain them, they might sweep off the whole of the property in *Scotland*, to the prejudice of the other creditors. This, though an important objection, is merely hypothetical; and if I reserve liberty to apply, I can deal with that case, if ever it should actually arise, and I can then allow the *Carron Company*, and the other creditors in *England*, to take such

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proceedings in *Scotland* as may prevent them from suffering the evil which might arise, from creditors out of the jurisdiction of this Court endeavouring to sweep of the assets of the testator in *Scotland*.


I am of opinion, therefore, that this circumstance ought not to prevent the Court from dealing with the case upon this motion; but that, having jurisdiction, ought to exercise it.

The third question is, whether the Plaintiffs have dealt with the Court, that the injunction ought, on the ground, to be dissolved, leaving the Plaintiffs to take such proceedings as they may think fit to adopt. The Court, undoubtedly, deals with great strictness and verity with persons who apply for *ex parte* injunction—the party applying is bound to put the Court in possession of all the facts, in order to enable it to judge whether the Defendant ought to be put to what may be occasionally a very serious evil, viz., a temporary injunction. The Court does not deal with the same strictness and severity in the case of an injunction obtained on notice, and very properly so; for there, the opposite party has the opportunity of bringing forward every circumstance favourable to his case. It is to be observed, that this injunction was not obtained *ex parte* but on notice. But if the respondent does not appear and the Plaintiff, taking advantage of his absence, silently misleads the Court, then I think, that the Court ought properly to visit the party, so dealing, with the consequences, though not with the same strictness in the case of an *ex parte* injunction. I have, therefore, to consider whether this is a case of that description.

After carefully considering the correspondence, it does  
 not

not appear to me to amount to any acquiescence, on the part of the Plaintiffs, in the proceedings taken by the *Carron* Company in *Scotland* for the purpose of enforcing their debt in that country.

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If it had been shown to me, that the executors, after acquiescence in or sanctioning the proceedings in *Scotland*, had come to stay them, without stating these circumstances to the Court, I should have thought very differently of the case to what I do at present.

I am of opinion, therefore, that the injunction must remain against the proceedings in *Scotland*.

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1852.

## BLAKENEY v. DUFAR.

July 29.  
A Plaintiff went abroad, pending a suit, under circumstances of suspicion. Upon his failing to show that his residence there was temporary, he was ordered to give security for costs.

THE Defendant moved, that the Plaintiff might give security for costs, on the ground of his residence abroad. The bill was filed in *March*, 1851, at which time the Plaintiff was resident in *England*. He afterwards changed his residence, and for some time resided with his solicitor in *Jermyn Street*. Being in embarrassed circumstances, he went to *Jersey* at the end of *May*, 1852, and was still resident there.

The only affidavit in opposition was made by the Plaintiff's solicitor, who stated, that the Plaintiff had gone to *Jersey* on a visit to his sister, without, as he believed, intending permanently to reside there, and that he had seen a letter from the Plaintiff, in which he expressed his intention of shortly returning to *London*.

Mr. *Smythe*, in support of the motion, relied on *Weebs v. Cole* (a), where security for costs was ordered, in a case in which the Plaintiff, pending the suit, had abandoned this country, and gone to reside in the *Isle of Man*.

Mr. *Elderton*, *contra*.

First, the Plaintiff is not resident or settled abroad, *Hoby v. Hitchcock* (b); secondly, the Defendant ought to have applied earlier, *Craig v. Bolton* (c); *Anon.* (d); *1 Daniell's*

(a) 14 *Ves.* 518.  
(b) 5 *Ves.* 699.

(c) 2 *Bro. C. C.* 609.  
(d) 10 *Ves.* 287.

1 *Daniel's Pr.* (a); and thirdly, the Defendant, by his conduct, has deprived himself of any claim to the interposition of the Court.

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*The MASTER of the ROLLS.*

I think you are entitled to the order. The state of the case is this:—This gentleman, in the early part of the year, leaves his residence, and it does not appear where he went, except that for some time he was residing with his solicitor. He then appears in *Jersey*, and writes that he thinks of coming back.

This is not a case of a Plaintiff who, having ordinary residence here, goes abroad for a temporary purpose. It is clear, that in consequence of pecuniary embarrassments, arising out of other circumstances, the Plaintiff has not and does not intend to have any fixed residence in this country.

He must give security for costs.

(a) Page 30 (2nd ed.)

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NOTE.—Affirmed by the Lords Justices, 11 Nov. 1852, 2 *De G., M. & G.* 771.

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1852.



## BRADLEY v. MUNTON.

*August 2.*

A vendor agreed to surrender or procure some person to surrender, and the costs of the surrender were to be paid by the purchaser. It was found necessary to procure a surrender under the Trustee Act. Held, that the costs of the proceedings ought to be paid by the vendor.

BY a contract, the vendor was to surrender or procure some person to surrender, and the costs of the surrender were to be borne by the purchaser.

The heir being unknown, it became necessary to get a person to surrender under the Trustee Act, and the question was, by whom the expenses of the petition, &c. were to be paid.

Mr. *Roupell* and Mr. *Rasch* contended, that, by the contract, the costs were to be paid by the purchaser.

Mr. *R. Palmer*, *contrà*, was not heard.

*The MASTER of the ROLLS.*

I cannot concur in the argument. The costs of sale in the absence of contract, fall on the vendor, and the costs of preparing the conveyance on the purchaser; but the costs of executing it must be paid by the vendor.

Here the contract is, that the vendor shall surrender or procure some person to surrender, and that the costs of the surrender shall be borne by the purchaser. There is a difference between the mere act of surrendering and the steps which may be necessary for the purpose of procuring some proper person to perform that act. They are distinct, and the costs of procuring some proper person to surrender must, on ordinary principles, be paid by the vendor, and the costs of the surrender by the purchaser.

1852.

*Re CLANCY.*

**T**HE testator bequeathed to the Catholic Bishop for the time being of the *London* district, and to the chaplain for the time being of *St. James's* Catholic Church, the sum of 400*l.* three pounds five shillings per cents., "to be applied by them *for the establishment of a charity school* for poor Catholic children in Reading."

*August 2, 3.*

Gift of stock  
"for the es-  
tablishment of  
a charity  
school," held  
void.

The fund was paid into Court, and the question was, whether the gift was void, as being contrary to the spirit of the Statute of Mortmain.

*Mr. R. Palmer, Mr. J. H. Palmer, Mr. Amyott, Mr. Follett* and *Mr. W. M. James*, for different parties.

*Trye v. The Corporation of Gloucester* (a); *Johnston v. Swann* (b); *Longstaff v. Rennison* (c); *The Attorney-General v. Davies* (d); *Crafton v. Frith* (e); *Re Deakin's Charity* (M. R. unreported), were cited.

*The MASTER of the ROLLS.*

Consistently with my decision in *Trye v. The Corporation of Gloucester*, and with that of the Vice-Chancellor *Kindersley*, I must hold this gift void. I have laid down the rule, that any bequest tending to bring fresh land into mortmain is void; and the Vice-Chancellor *Kindersley* expressly states, that if it would be a  
due

(a) 14 *Beav.* 173.(b) 3 *Mad.* 457.(c) 1 *Drewry*, 28.(d) 9 *Ves.* 544.(e) 20 *L. J. Ch.* (N. S.) 198.

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due execution of a trust to buy land for the purpose of erecting a school, the gift is void. The question is, whether this case does not fall within the rule. The testator directs the school to be "established." He therefore points to a permanent establishment, and how can this be effected without a school, which must stand on land to be procured for the purpose?

The Vice-Chancellor *Kindersley* very properly observed, that the correct way of judging of such a gift is, to see whether the proper mode of executing the trust would not be to buy land and build the school, which cannot be made permanent without it.

I think, in accordance with my own view, and with that of the Vice-Chancellor *Kindersley* and the Vice-Chancellor of *England* in *The Attorney-General v. Hodgson* (a), that this gift is void; for it points to a permanent establishment of a charity, for which purpose it is necessary to bring land into mortmain. I must declare the gift void, and that it falls into the residue.

(a) 15 Sim. 146.

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NOTE.—See *The Incorporated Society for promoting the Enlargement, &c. of Churches v. Barlow*, Lords Justices, 8th March, 1853, 3 De G., M. & G. 120.

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1852.

*Re The Overseers of ECCLESALL.*

**B**Y this petition, presented under the 52 Geo. 3, c. 101, the sanction of the Court was sought to the sale of some real estate belonging to a charity. The rental in 1839 was 12*l.* 12*s.*, and the price offered was 680*l.*, and the value was said to be 530*l.*

*August 2.*  
The sale of charity lands authorized, under Sir Samuel Romilly's Act, it being beneficial to the charity.

Mr. Lloyd and Mr. Humphry, in support of the petition, relied on *In re Parke's Charity* (a).

Mr. W. M. James, for the Attorney General, opposed the application, on the ground that the Court never directed the sale of charity land merely on the ground of advantage. He also stated, that in a recent case, upon the sale of mineral property which the charity could not work, Lord Cranworth required the produce to be re-invested in land.

*The MASTER of the ROLLS.*

On the authority cited, I think it may be done, it being obviously for the benefit of the charity.

(a) 12 Sim. 329, and see the note, 14 Beav. 120.

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**NOTE.**—Subsequently, in *Re Lyford's Charity*, the MASTER of the ROLLS hesitated in making a similar order. (2nd August, 1852.)

Mr. Baggallay, in support of the petition.

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1852.

## MOFFAT v. BURNIE.

August 3.

A testator gave the interest of his residue to *W.* and his wife, with remainder to the testator's grandchildren. *W.* died twenty-nine years after the testator, and his wife applied for the income. The Court, being unable to decide on her right, in consequence of the absence of some parties, allowed her, in the meanwhile, to receive a portion of the income, on her undertaking to refund if necessary.

THE testator expressed himself as follows:—"The remainder of my property, of whatsoever it may consist, such money as arises from it to be invested in the public funds, the interest to be appropriated *to the use of my said son William Moffat and his wife Jane, with remainder to my grandchildren* in equal proportions."

The testator died in 1822.

*William Moffat* died the 25th of *August*, 1851, having received the income during his life. A decree had been made in this suit on the 10th of *July*, 1852, and the fund was in Court. *Jane Moffat* now presented a petition for payment to her of the dividends for life.

The questions were, first, whether the wife was entitled, the second, whether the grandchildren were to be ascertained at the death of the testator or of the tenants for life, and thirdly, some of the grandchildren having died, whether their personal representatives were necessary parties to the suit.

Mr. *Willcock* and Mr. *C. Hall*, in support of the petition, on the first point, cited *Armstrong v. El-drige* (a); *Townley v. Bolton* (b); *Hatton v. Finch* (c); *M'Dermott v. Wallace* (d).

Mr.

(a) 3 Bro. C. C. 215.  
(b) 1 Myl. & K. 148.

(c) 4 Beav. 186.  
(d) 5 Beav. 142.

Mr. *Roupell*, Mr. *Cotton*, Mr. *Glasse*, and Mr. *Leach*,  
for other parties, cited *Harvey v. Harvey* (a).

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MOFFAT  
v.  
BURNIE.

Mr. *Lloyd*, for the executors, objected, that the point could not be determined in the absence of the representatives of the deceased grandchildren; *Caldecott v. Caldecott* (b); *Say v. Creed* (c). The executors, he said, might be subject to great responsibilities in allowing the fund to be parted with, in the absence of the parties interested; *Knatchbull v. Fearnhead* (d). This, he said, they were not inclined to incur.

*The MASTER of the ROLLS.*

My impression is, that I am not in a situation to decide in the absence of these parties. I might decide against the Petitioner, but not in her favour. I am disposed to think, that, considering the length of time that the income of this fund has been paid, I must make some arrangement, whereby this lady may receive the whole or some part of the income, if it can be safely done. While abstaining from expressing any opinion on the merits, I am desirous of giving to the Petitioner everything I reasonably can, and I will allow her to receive the interest of the consols, on her undertaking to refund, if that should turn out to be necessary.

134. (a) 4 *Beav.* 215, and 5 *Beav.*  
(b) *Cr. & Ph.* 183.

(c) 3 *Hare*, 455.  
(d) 3 *Myl. & Cr.* 122.

NOTE.—See *Dando v. Dando*, 1 *Sim.* 510; 15 & 16 *Vict.* c. 86, ss. 42, 57 (1 Nov. 1852).



1852.

## MANGIN v. MANGIN.

August 3.

Bequest of  
"all the  
funded pro-  
perty in my  
name," held to  
pass Irish  
Bank stock  
and Irish 3½  
per cents. be-  
longing to the  
testator, and  
standing in his  
name jointly  
with three  
others.

A legacy  
was, after cer-  
tain limita-  
tions, "to re-  
vert to the  
possessor of  
the estate."

Held, that the  
tenant for life  
of the estate  
took it abso-  
lutely.

THE testator bequeathed as follows:—"I leave my brothers, *Henry Marcus Mangin* and *George W. Mangin*, all the funded property in my name in the *Bank of Ireland*, which is not entailed with the estates, to be equally divided between them, and at the death of my brother *George W.* (a lunatic), his share to come to my brother *Henry Marcus Mangin*. And in case of the marriage of my brother *Henry Marcus Mangin* (granting that his wife is in the station of a lady), I desire that he should have the power to leave it to her or her children by will; otherwise, that it should *revert to the estate*. I also leave my uncle *Alexander Mangin* and *Henry Denton* the trustees for that property, and I desire that they will only give the interest to my brother *Henry Mangin*." . . . "At the death of my brothers, the money to *revert to the possessor of the estate*, except my brother *Henry* marries a person in the position of a lady, in which case he has the power to leave both sums to her or her children."

The testator died in 1848, and his brother *Henry* died in 1850, without having been married.

The Master found, that the testator, at the date of his will and death, was not possessed of any funded property in the *Bank of Ireland* standing in his name alone, but that at such periods, he was possessed of or entitled to 3,212*l.* 6*s.* 2*d.* stock of the Governor and Company of the *Bank of Ireland*, commonly called Irish Bank stock, and 5,300*l.* 1*s.* 6*d.* Irish 3*l.* 5*s.* per cent.

cent government stock, standing in his name jointly with three other persons, which were not entailed with the estate.

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v.  
MANGIN.

The estate was settled on *George* for life, with remainder to his first and other sons in tail, with remainder to *Reuben* for life, &c. &c., so that *George* was the first tenant for life.

Mr. *Headlam*, for the Plaintiff.

Mr. *Follett* and Mr. *W. M. James*, for *George Mangin*. The bank stock does not pass, for it is no more "funded property" than shares in the *Westminster Bank* or any other joint stock company (a). Neither are the Irish 3½ per cents. included, for the sum was not in the testator's name, but in the name of himself and three others (b). Secondly, if it passes, it is to "revert to the possessor of the estate;" and therefore *George*, as such possessor, took half in his own right and the other half absolutely as possessor of the estate.

Mr. *Busk*, for *Denton*.

Mr. *Stuart* and Mr. *Osborne*, for the second tenant for life, argued, that the funds went over to the possessors of the estate, according to the same limitations.

Mr. *Roupell* and Mr. *Simpson*, for the first tenant in tail, argued, that the funds were to revert to all the possessors of the estate, according to their interests therein, and that their interests in the funds were commensurate with their interests in the estate. That the fund

(a) See *Ridge v. Newton*, 2 D. & War. 239, and *Burnie v. Getting*, 2 Collyer, 324. (b) See *Quennell v. Turner*, 13 Beav. 240.



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 MANGIN  
 v.  
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fund must have been taken out of the estate by the testator, and that he intended it to revert in the same way as if it had never been withdrawn from the operation of the existing settlement of the family estate.

*The MASTER of the ROLLS* held, that the Irish bank stock and the Irish 3*l.* 5*s.* per cents. passed by the bequest, and that *George* took the moiety of *Henry* absolutely.

May 6, 25.  
 Nov. 3.

BROWN v. GORDON.

As to the equity of a creditor of a partnership to obtain payment out of the separate estate of a deceased partner.

A creditor of a banking firm held to have accepted the surviving partners as his debtors, and to have lost by sixteen years delay and his conduct, the benefit of a trust contained in the will of the deceased partner for payment of his debts out of his real estate.

Where a man fills two characters, he may do an act which may affect him in one, but not in the other character.

Payment of interest on a debt by surviving partners, one of whom was the executor of a deceased partner, held to have no reference to the executorial character.

ON the 22nd of *February*, 1827, the Plaintiff deposited the sum of 110*l.* with the *Honiton* Bank, and took from them a promissory note in the following form :—

“ *Honiton* Bank, 22nd *February*, 1827.

“ Twenty days after sight I promise to pay Mr. *Robert Brown*, or bearer, 110*l.*, value received, with interest at the rate of 3*l.* per cent. per annum, to the day of acceptance. For *Flood, Lott & Lott*.

“ EDWARD LOTT.”

At this time the banking firm consisted of *H. Baines Lott*,

DATES.

1827. Note given.  
 1830. *C. Samuel Flood* admitted.  
 1833. *H. Baines Lott* died.  
 1835. *Edward Lott* died.

1843, *March*. *C. Flood* died.  
 1847. Bankruptcy.  
 1849, *July* 6. Bill filed.

*Lott*, *Christopher Flood* and *Edward Lott*, but in 1830 *C. Samuel Flood* was admitted a partner. The partnership continued unaltered down to the 20th of June, 1833, when the testator, *H. Baines Lott*, died, having by his will devised and bequeathed his real and personal estate to the Defendant *Gordon*, *T. E. Clarke* and to his son *H. Buckland Lott*, upon trust, by such ways and means as they should think fit, to raise money to pay his debts and funeral and testamentary expenses; and, after payment thereof and subject thereto, he gave his property in trust for his son *H. Buckland Lott*, and appointed him the sole executor of his will.

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GORDON.

*H. Buckland Lott* proved the will, and shortly afterwards the affairs between the bank and the testator were settled, and *H. Buckland Lott* was admitted into the firm as a partner. The firm continued to consist of the three remaining partners of his father and himself down to Christmas day, 1835, when *Edward Lott* (one of the original partners of the testator, and one of the persons liable on the promissory note) died. The surviving partners continued to carry on the business until the month of March, 1843, when *Christopher Flood* (the last survivor of the partners who composed the firm when the note was given) died. From his death, the remaining partners, *C. Samuel Flood* and *H. Buckland Lott*, continued to carry on the business of the firm until the month of November, 1847, when the bank stopped payment, and on the 23rd of that month, a fiat in bankruptcy was issued against both the partners. No claim was ever made by the Plaintiff against the estate of the testator, but the interest due on the promissory note was regularly paid every half year at the bank, down to the time of the bankruptcy, and the payments were entered in the bank books, but not in the executorial account. The Plaintiff proved this debt against

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v.  
GORDON.

the estate in the bankruptcy, and on the 6th of July, 1849, he filed the present bill on behalf of himself, and all other the creditors of *H. Baines Lott*, seeking to make his real and personal estate liable for the payment of the promissory note.

Mr. Willcock and Mr. Giffard, for the Plaintiff. Though at law a partnership debt is joint, and the survivors alone are liable, yet, in equity, such a debt is several as well as joint, and the creditor is entitled to payment out of the assets of the deceased partner; *Wilkinson v. Henderson* (a); *Lane v. Williams* (b). "It cannot be disputed now, that the estate of a deceased partner is liable, in equity, to the creditors of the firm, although the legal remedy exists only against the survivors," *Winter v. Innes* (c). The equity of the creditor is founded on the equities subsisting between the partners, and of which the creditor has a right to avail himself, and the statute does not apply, so long as the surviving partner continues liable to the payment of the debt; *Winter v. Innes* (d); *Braithwaite v. Britain* (e).

Secondly.—The Statute of Limitations is inapplicable, for interest has been paid, down to 1847, by the existing firm, who must be considered as acting not only for themselves, but on account of the estate of the deceased partner, and of which one of them (*H. Buckland Lott*) was the executor. *Braithwaite v. Britain* (f) was a case very similar to the present, for there was a charge on the real estate and nine years had elapsed. Thirdly.—There is an existing trust for payment of debts, which authorizes a sale or mortgage; *Ball v. Harris* (g); *Shaw v. Borrer*;

(a) 1 Myl. &amp; K. 562.

(b) 2 Vern. 292.

(c) 4 Myl. &amp; Cr. 109.

(d) *Ibid.* 111.

(e) 1 Keen, 221.

(f) *Ibid.*

(g) 4 Myl. &amp; Cr. 264.

*v. Borrer*(a); and that trust, being still subsisting, prevents the operation of the Statute of Limitations. Fourthly.—To discharge the estate of the testator, by reason of the adoption of the surviving partners as debtors, there must be an actual contract to substitute the sole liability of the existing firm, and here there is no evidence of any such contract, *Harris v. Farwell* (b).

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Mr. R. Palmer and Mr. Hetherington, for the representatives of the testator; Mr. J. D. Chambers, for Gordon the trustee; and Mr. Follett and Mr. Nichols, for the assignees of *H. Buckland Lott, contra*. The right of a joint creditor to obtain payment out of the assets of a deceased debtor is "an equitable right only, to be met therefore by equitable circumstances," *Ex parte Kendall* (c). "That right standing only upon equitable grounds, if the dealing of a creditor with the surviving partners has been such, as to make it inequitable that he should go against that fund, he would not, upon general rules and principles, be entitled to the benefit of that demand" (d). Such is the case here; the Plaintiff, after allowing sixteen years to elapse without making any claim against the assets of the deceased partner, after adopting the surviving and succeeding partners as his debtors and receiving interest from them, and after proving his debt under their bankruptcy, seeks to disturb the position of those, who for nearly twenty years have enjoyed the testator's property undisturbed. Again, his delay has rendered it impossible to place the parties in the same position in which they would have been in, if he had originally insisted on payment out of the testator's estate.

A trust for payment of debts out of personal estate  
is

(a) 1 *Keen*, 559.

(c) 17 *Ves.* 522.

(b) 13 *Beav.* 403, and 15 *Beav.*

(d) *Ibid.* 526.

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 v.  
 GORDON.

is simply inoperative; *Scott v. Jones* (a); *Freak v. Cnefeldt* (b). Here the testator died in 1833, and right against his personal estate was barred, by the Statute of Limitations, in 1839. *Edward Lott* died 1835, and his personal estate was released by the statute in 1841. *Christopher Flood* died in *March*, 1843, and the statute applied to his personal estate in *March*, 1844 so that all right has been lost as against these three estates. The testator did not intend to charge his real estate, except as auxiliary to his personal estate, and the Plaintiff, having lost his right to the latter, is not entitled to have recourse to the former.

Payment of interest by the surviving partner is sufficient to prevent the operation of the Statute of Limitations, *Way v. Bassett* (c); and although the executor of the testator was one of the partners, still till payment was not made by him in that character. The acts of a surviving partner, who is also the executor of a deceased partner, and which he, in the character of surviving partner, is bound to do, cannot be imputed to his character of executor, *Way v. Bassett* (d).

The Plaintiff, by his mode of dealing subsequent to the death of the testator, has accepted the security of the surviving partners, *Thompson v. Percival* (e).

*The MASTER of the ROLLS* reserved his Judgment.

Nov. 3.

*The MASTER of the ROLLS.*

The bill, in this case, is filed by the Plaintiff, on behalf of himself and all other the creditors of *Henry Bain*

(a) 4 Cl. & Fin. 382, reversing  
 1 Russ. & Myl. 255.  
 (b) 3 Myl. & Cr. 499.

(c) 5 Hare, 55.  
 (d) Ibid. 67.  
 (e) 5 B. & Ad. 925.

*Baines Lott*, deceased, for the administration of his estate. The Defendants, who are the legal personal representatives of *Henry Baines Lott*, contest the fact alleged by the Plaintiff, and which forms the foundation of his equity, viz., that he is a creditor of the deceased testator, or that he is entitled to make any claim against the testator's estate. This is the question to be determined at this stage of the cause, and the solution of it depends upon whether the acts of the partners and successors in business of the testator have kept alive a debt, which otherwise would have been barred by the Statute of Limitations. The facts of the case are these. [*His Honor here stated the above facts.*] The question is whether, in this state of circumstances, the Plaintiff is entitled to that relief, or whether such claim as he might have made at the death of the testator, has not since been barred by the lapse of time. On behalf of the Plaintiff it was urged, that this was originally a joint liability on the part of all the members of the firm, but that in equity it is treated as joint and several. In support of which proposition, the case of *Lane v. Williams and Wilkinson v. Henderson* were relied upon. That, consequently, the liability of the testator did not determine with his death, but that the several liability continued in equity, and that the firm having duly paid interest on this note until within two years of the filing of the bill, must, for this purpose, inasmuch as the executor of the testator was one of such partners, be treated as the agents of the persons interested in the testator's estate for that purpose.

If the Court should be adverse to the Plaintiff on this argument, it is then contended, that the testator has, by his will, created an express trust for the payment of his debts out of his real estate, and that, accordingly, the real estate must be so applied.

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v.  
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In

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In considering the former of these positions, and the effect of the payment of the interest on the note by the bankers, it is essential to determine in what character the interest was paid. If it was paid by them in the character of agents for the persons interested in the real estate of the testator, these persons will be bound by such payments; but if the bankers paid the interest, not in the character of agents, but as the debtors of the plaintiff, then the estate of the testator cannot be affected by these payments; and in that case, the liability of the real estate will remain the same as if the payments had not been made. Before it can be determined that the bankers were agents for this purpose, it must be considered, how the agency for this purpose, if it existed, was created. It might be created by express authority or by implication. Express authority, in this case, there is none; on the contrary, it is excluded by the circumstance, that the affairs between the bank and the testator seem to have been settled immediately after his decease, and that subsequently, no claims were made or liabilities existed between them on either side. If therefore the agency existed, it must have been created by implication. The only implication for such purpose which could exist in the present case, if at all, must arise out of the relation of the parties; and the only circumstance that is or can be referred to as creating this implied agency and authority is, that one of the partners, and therefore one of the persons paying the money, was also one of the trustees of the real estate of the testator and the sole executor of his will.

It does not follow, because a man fills various characters at the same time, that the act done by him in one of those characters has reference to or can affect him

him in another of these characters<sup>(a)</sup>. It is every day's experience, that a person made a Defendant to a suit in Chancery, as beneficially interested in the subject-matter of it, may also, at the same time, be the representative of a deceased person, also similarly interested in the subject of the suit; but if this Defendant has not been made a party in respect of his representative character, the estate of the deceased person will not be affected by the decision in that suit. In this case, unless the bare circumstance of one of the partners being the executor of the testator's will and one of the devisees in trust of his real estate, can make all his acts, as a banker, referable to him as a trustee, where such a reference can have any effect, it will be impossible to hold that the estate of the testator was bound. It clearly was not supposed by *Henry Buckland Lott* that it was in his character of executor that he made the payments. They appear in the accounts of the bank, but they do not appear in the accounts of the executors. It is obvious, that *Christopher Lott* paid them as partner only, and that the firm considered themselves to be alone liable for this debt. No reasonable doubt can exist, but that in the settlement of accounts between themselves and the estate of the testator, this liability, in common with many others of a similar description, was taken into account, in settling what was due to or from the testator in respect of the partnership. It would be therefore with great pain, if I should find myself, by the settled decisions on this subject, compelled to imply any such agency. The cases, however, have no such tendency, and, in truth, the case of *Way v. Bassett* decides this question the opposite way. The debt was, at the death of the testator, gone at law. It remained no doubt a debt due from his estate in equity, because equity considers

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(a) See *Coppin v. Coppin*, 2 P. Wms. 295.



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siders it to be unjust, that where two or more persons are jointly liable, the death of one should throw the whole debt on the other persons jointly liable with the deceased debtor, and thus exonerate his estate; and this, as was justly urged in argument, is the principle of *Wilkinson v. Henderson*, *Ex parte Kendall*, and of *Way v. Bassett*.

But even if that principle were applicable here, and if, as between the partners, the estate of the testator had never borne its share, how would the Plaintiff be entitled? *Christopher Flood*, the survivor of the three partners who were originally liable on the note, died in *March*, 1843, and the bill was not filed till *July*, 1849. Even, therefore, on this principle, the statute would, without any assistance arising from this equitable doctrine, have barred all remedy against the personal estate of the testator, in six years after the death of the surviving partner, that is, in *March*, 1849, which is previous to the filing of the bill. In every way, therefore, that I regard it, I am of opinion that all right to go against the personal estate of the testator had ceased prior to the filing of the bill.

If the personal estate of the testator is not affected, neither is the real estate, unless it be by the trust which he has created; and as I am of opinion, that the payment of interest may be wholly disregarded, so far as relates to the personal estate, it follows also, on the same principle, and for the reasons I have stated, which are equally applicable to both sorts of property, that this payment will not affect the real estate.

If, therefore, the real estate of the testator can be fixed with the payment of this sum of money, it must be in respect of the form in which he had devised his  
real

real estate, by making it subject to a trust for the payment of his debts. The trust is undoubtedly clear and distinct; but I am of opinion that it will not entitle the Plaintiff to enforce payment of this sum against the testator's real estate, because, in truth, it is not now a debt against the estate. The case stands thus:—At the testator's death, there was not any debt at law; but an equity existed, by which the Plaintiff was entitled to stand in the place of the surviving partners, as against the testator's estate. This is decided by *Way v. Bassett*. The Plaintiff has not thought fit to avail himself of this equity, but has, in lieu thereof, accepted the surviving partners, who were liable to him at law, as his only debtors. Can it be properly urged, that in this state of things, he is a *cestui que trust* created by the testator's will, and having neglected all claim against that estate, from *June*, 1833, till *July*, 1849, when the bill was filed, a period of sixteen years, he can now seek to enforce this equity by means of this trust? I am of opinion that he cannot. He has, from the earliest period since the death of the testator till the bankruptcy of the surviving partners, accepted the partners as his debtors, and has proved this debt against their estate, as if they were his sole debtors. This alone, according to the doctrine in *Thompson v. Percival*, would discharge the testator's estate.

But it is further to be observed, that by accepting them as his debtors, and taking no step against the testator's estate, he has made it impossible for the Court, if he were allowed this equity, to place the persons interested in the estate of the testator in the same position in which they would have been, if this equity had been earlier enforced. If, at the death of the testator, the Plaintiff had insisted on payment out of the assets of the testator, the effect would have been, that

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the estate would have been recouped, by a contribution from the surviving partners in the settlement of accounts between them, and no injustice would have been occasioned. No such contribution would now be possible, and it does not appear to me to be consistent with the principles, upon which this Court administers its equities, to allow the Plaintiff to claim the benefit of one which he has repudiated for sixteen years, and when the position of the parties interested is so materially altered, that it could not now be enforced against the Defendants, without doing manifest injustice to them.

I am of opinion, therefore, that the trust for the payment of debts created by the will of the testator does not entitle the Plaintiff to the relief he asks, and that consequently his case fails, and that his bill must be dismissed with costs.

## ROWLEY v. ADAMS.

Nov. 3.

Proceedings were stayed as against the legal personal representative. A petition having been presented, professing to deal with funds standing to the general credit of the cause, he was served therewith, and with a notice not to appear. Held, nevertheless, that he was entitled to his costs of appearance.

BY an order in the cause, all proceedings had been stayed as against Mr. *Marks*, the legal personal representative of the testator.

A petition was now presented for winding-up the suit, and by which it was proposed, that funds standing to the general credit of the cause should be carried over to particular accounts, &c.

The petition was served on the solicitor of Mr. *Marks*, accompanied with a notice that he was not interested therein, and should not appear at the hearing.

Mr.

**Mr. R. Palmer**, for the petition, insisted that no costs ought to, under the circumstances, to be given to *Marks*.

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v.  
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**Mr. Speed**, for *Marks*, asked for the costs of his appearance.

**Mr. Steere**, for a purchaser of part of the estate, made a similar application.

*The* MASTER of the ROLLS gave them their costs.

**NOTE.**—See *Heneage v. Aikin*, 1 Jac. & W. 377; *Templeman v. Warrington*, *ibid.* note (a); *Crawshay v. Thornton*, 2 Myl. & Cr. 24; *Bamford v. Watts*, 2 Beav. 201; *Bruce v. Kinlock*, 11 Beav. 432; *Kilminster v. Noel*, 12 Beav. 246, and *Day v. Croft* (Lords Justices), July, 1853.

*The* ATTORNEY-GENERAL, at the relation of W. W. and E. P. v. WYGGESTON'S HOSPITAL.

Aug. 4.

Nov. 3, 24.

A DECREE was made on the 28th July, 1849, directing accounts and inquiries (a). Certain facts having (as alleged) come to light pending the inquiry, a petition was presented "by the informant at the relation aforesaid," praying very special inquiries, as to the propriety of proceeding to set aside a lease, as to encroachments, timber, inclosures, lands sold to railways, &c. &c., relating to the charity property.

A special petition having been presented by relators in the name of the Attorney-General, the Court first directed the Attorney-General to be served, and at the hearing, ordered the petition to stand over, with a request to the Attorney-General to

**Mr. Lloyd** and **Mr. Morris**, in support of the petition.

*The*

(a) 12 Beav. 124.

certify the course he thought it desirable to adopt on the petition. The relators appealed, when the Attorney-General asked that the petition might be dismissed, which was done accordingly by the Lord Chancellor, with costs, notwithstanding the opposition of the relators.

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ATTORNEY-  
GENERAL  
v.

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HOSPITAL.

Nov. 24.

*The MASTER of the ROLLS* directed the *Attorney-General* to be served with the petition.

The petition was again called on, when,

Mr. *W. M. James*, for the *Attorney-General*, said, that the decree having directed a scheme, he considered that the petition sought for more than the relators were entitled to ask of their own authority.

*The MASTER of the ROLLS.*

This petition involves so many questions, that I am not disposed to make an order, without the assistance of the *Attorney-General*. The best course will be, to request him to send down some one to the spot to make inquiries, and then to make his report.

Mr. *Lloyd*, on behalf of the relators, objected to that course.

*The MASTER of the ROLLS.*

The petition must stand over and be laid before the *Attorney-General*, with a request from me, that he will favour me with his opinion as to the course he thinks desirable to be adopted with respect to this petition (a).

(a) See *Attorney-General v. Brettingham*, 3 Beav. 91; *Attorney-General v. Pretymen*, 4 Beav. 467; *Attorney-General v. Corporation of Carlisle*, 4 Sim. 275; *Attorney-General v. The Merchant Tailors Company*, 5 Sim. 288; *Attorney-General v. The Ironmongers Company*, 2 Beav. 313; *Attorney-General v. The Corporation of Galway*, 1 Molloy, 97; *The Corporation of Ludlow v. Greenhouse*, 1 Bli. (N. S.) 44.

NOTE.—The relators appealed, in the name of the *Attorney-General*. At the hearing before the Lord Chancellor, the *Attorney-General* asked that the petition might be dismissed, which was done, with costs, notwithstanding the opposition of the relators (19 Jan. 1853).—M.S.

1852.

BRIDGE v. BRIDGE.

May 26, 27.

June 29.

Nov. 4.

**T**HE question in this case related to the validity of a voluntary deed, dated the 9th of April, 1847, and executed by the Plaintiff, *John London Bridge*, under the following circumstances :—

Under the will of his uncle, who died in 1834, the Plaintiff became entitled to one-fifth part in two houses in *Dean Street, Soho*, in fee simple, and to one-fifth of the residuary estate and effects of the testator, of which a portion consisted of certain shares and bonds, of which the Plaintiff's share was the following, viz. :—

300 Shares in the General Mining Association.

20 " " " *Regent's Canal Company*.

30 " " " *Columbian Bonds*.

The one-fifth of the remaining portion of the residuary personal

Doctrine of the Court as to voluntary and incomplete settlements.

Where a donor creates a legal debt, in favour of a volunteer, and the trustee declines to act, this Court will enforce payment of the debt for the benefit of the volunteer.

If the legal owner of stock execute a declaration of trust in favour of a volunteer, equity will compel

the execution of the trust; but if he merely assigns the stock and makes no transfer, the Court will afford him no assistance.

If the beneficial owner of stock standing in the name of trustees assign it in favour of a volunteer, and notice is given to the trustees, who act upon it, equity will enforce the performance of the trust in favour of the volunteer.

When the owner of property, vested in *A.* and *B.* as trustees, purported to assign it to himself and others, in trust for volunteers, but no legal transfer was made, or recognition of the trust by *A.* and *B.*, held, that the relation of trustee and *cestui que trust* had not been created in favour of such volunteers.

Voluntary settlement of an equitable interest in real estate held ineffectual, the legal estate not having passed to the trustees thereof.

The Plaintiff being entitled to shares in companies, foreign bonds, consols, cash and real estate, which were vested in the trustees of his uncle's will, executed a voluntary deed, whereby he granted the realty to *A.* and *B.*, to the use of himself and *A.* and *B.*, upon trust to sell, and he directed that the produce and the bonds, &c., should thenceforth be considered vested in him and *A.* and *B.* on certain trusts for volunteers. Held, that the deed was valid as to the shares and bonds, which had been transferred to the Plaintiff and *A.* and *B.*, but ineffectual as to foreign bonds, stock and cash, of which there had been no transfer, and no acceptance of the trust by the trustees of the uncle's will, in whom they were vested, and ineffectual also as to the realty, the legal estate not having passed.

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personal estate of the testator to which the Plaintiff entitled, was admitted by the Plaintiff and Defendant at the time of the execution of the deed in question have amounted to the sum of 12,694*l.* 1*l.* 3*d.* 3 per annuities, a balance at the bankers of 475*l.* 10*s.* and an estate at *Clifton Maybank*, in *Dorsetshire* which he was tenant for life, with remainder to his issue. The trustees of the will were empowered to apply the interest of these funds and estates for the benefit of the Plaintiff till he was twenty-five, at which age he was to be put into possession of them and of his share of the residuary estate, which was then to be paid over to

The testator died early in 1834, and on the *May* in that year his will was proved by the four trustees and executors. The Plaintiff attained his majority twenty-one years on the 10th of *February*, 1846, but he shortly before married.

On the 9th *April*, 1847, the Plaintiff, being upwards of twenty-two years of age, executed a deed which was made between the Plaintiff of the one part and himself and *John Edward Bridge* and *Alexander Gordon* of the other part; and after reciting what the Plaintiff was entitled to under his uncle's will, and that a settlement of accounts had been come to between himself and his trustees since he had attained his majority, and after further reciting, that by an indenture 20th *March*, 1847, he had settled 1,600*l.* *East India* stock, in trust to pay the dividends to the lady who had lately married for her life, for her separate use without power of anticipation, and subject thereto in trust for himself, the deed proceeded to recite, that the Plaintiff was desirous and had determined to make a settlement as thereafter contained of all the property he was entitled to under his uncle's will, together

the absolute reversion in the *East India* stock to which he was entitled on his wife's decease; and after reciting that *John Edward Bridge* and *Alexander Gordon* had agreed to become trustees, together with the Plaintiff, of the intended settlement, the Plaintiff conveyed to *John Edward Bridge* and *Alexander Gordon* all his interest in the real estate (the legal estate of which was vested in the trustees of the testator's will), to hold to the use of the Plaintiff and *John Edward Bridge* and *Alexander Gordon* and their heirs, upon trust to sell. The Plaintiff directed, that the produce and the personal estate and effects before mentioned, transferred or to be transferred into the names of the trustees, should thenceforth be and be considered vested in the Plaintiff, *John Edward Bridge*, and *Alexander Gordon*, in trust for himself for his life, and subject thereto, for his children, as he should appoint, and in default, amongst all the children equally. The deed then contained powers for advancement and maintenance, and declared, that if there should be no child entitled, that the trustees should stand possessed of the trust funds for such person as the Plaintiff should by will appoint, and in default, upon trust for his next of kin under the Statute of Distributions. It also contained a covenant on the part of the Plaintiff for further assurance.

Subsequent to the date of the settlement, the property comprised therein was dealt with in the following way:—On the 4th of *May*, 1847, the 300 shares in the General Mining Association were transferred by the executors of the testator to the trustees of the deed of settlement of the 9th of *April*, 1847, and it appeared, by an entry in the books of the company, that these three trustees were the owners of these shares.

The twenty *Regent's Canal* shares had also been transferred to and were now vested in the Plaintiff and the other

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other two trustees of the indenture of the 9th *April* 1847. It appeared from the evidence, that the *Columbian* Bonds passed by delivery, and that the actual holder was treated as the beneficial owner of them by the *Columbian* government and its agents. Of these no transfer or delivery had been made to the trustees of the deed or to any one of them. On the contrary, these bonds having been originally in the custody of *John Gunter Bridge*, were, on his decease, transferred into the custody of *Alfred Charles Bridge*, another of the executors of the testator, in whose possession they now were.

The consols were also standing in the names of the four original executors, and the cash balance at the bankers was standing to the account of *Thomas Bridge Robert Bridge* and *Alfred Charles Bridge*, the three surviving trustees and executors of the testator's will.

There being no issue of the Plaintiff's marriage, he instituted this suit against the trustees and executors of his uncle's will, and against the trustees of the voluntary settlement and other necessary parties, praying a declaration of his rights in the real and personal property and a transfer of the latter, and that it might be declared, that the settlement of 1847 was not binding on him.

*Mr. Roupell*, *Mr. Lloyd* and *Mr. Southgate*, for the Plaintiff, contended that the deed was ineffectual.

*Mr. Kenyon Parker* and *Mr. Sandys* argued in favour of its validity.

*Mr. R. Palmer*, *Mr. Macnaghten*, *Mr. Grove* and *Mr. Allnutt*, for other parties.

*Beatson*

*Beatson* v. *Beatson* (a); *Colman* v. *Sarrel* (b); *Ward* v. *Audland* (c); *Sloane* v. *Cadogan* (d); *Fortescue* v. *Barnett* (e); *Edwards* v. *Jones* (f); *Antrobus* v. *Smith* (g); *Dillon* v. *Coppin* (h); *Searle* v. *Law* (i); *Ex parte Pye* (k); *Meek* v. *Kettlewell* (l); *Kekewich* v. *Manning* (m); *Bentley* v. *Mackay* (n); *Johnson* v. *Legard* (o); *Smith* v. *Garland* (p); *M'Fadden* v. *Jenkyns* (q); *Petre* v. *Espinasse* (r); *Pulvertoft* v. *Pulvertoft* (s); *Price* v. *Price* (t); *Bill* v. *Cureton* (u); *Fletcher* v. *Fletcher* (x); *Blakely* v. *Brady* (y), were cited.

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*The* MASTER of the ROLLS reserved his judgment.

*The* MASTER of the ROLLS.

The question which has been raised, in this case, and has now to be decided, is, the validity and operation of this deed of the 9th of April, 1847. The Plaintiff says that it is voluntary and void *in toto*. The Defendants submit to the Court the question, whether the deed be not operative, as to the whole of the property thereby purported to be settled, or if not as to the whole of the property included in it, at least as to such parts of it as have

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|----------------------------------------------|---------------------------------------------------------------|
| (a) 12 Sim. 281.                             | (m) 1 De G. M. & G. 176.                                      |
| (b) 1 Ves. jun., 50, and 3 B. C. C. 12.      | (n) 15 Beav. 12.                                              |
| (c) 8 Beav. 201, and 1 C. P. Cooper, 146.    | (o) 3 Mer. 254, n.; 3 Mad. 302; 6 M. & S. 60; Turn. & R. 281. |
| (d) 3 Sugd. Vend. & P. App. 66.              | (p) 2 Mer. 123.                                               |
| (e) 3 Myl. & K. 36.                          | (q) 1 Hare, 458, and 1 Phil. 153.                             |
| (f) 1 Myl. & Cr. 226.                        | (r) 2 Myl. & K. 496.                                          |
| (g) 12 Ves. 39.                              | (s) 18 Ves. 99.                                               |
| (h) 4 Myl. & Cr. 647.                        | (t) 14 Beav. 598.                                             |
| (i) 15 Sim. 95.                              | (u) 2 Myl. & K. 503.                                          |
| (k) 18 Ves. 149, and 1 Spence, Eq. Jur. 507. | (x) 4 Hare, 67.                                               |
| (l) 1 Hare, 464 and 1 Phil. 342.             | (y) 2 Dru. & Wal. 311.                                        |

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have been actually transferred to the trustees of the ~~—~~ indenture according to the trusts therein declared.

This deed and the facts about to be mentioned have raised questions, which have occurred frequently and in various forms of late years. There is, I think, no great difficulty in stating the principle which governs these cases, but very considerable difficulty is frequently to be encountered, in the application of them to particular instances; nor is it, in my opinion, easy to reconcile all the decisions, or at least all the *dicta* to be found in the reported cases on this subject.

The rule is thus stated by Lord *Eldon* in *Ellison* v. *Ellison* (a):—"I take the distinction to be, that if you want the assistance of the Court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance, for the purpose of constituting you *cestui que trust*. As upon a covenant to transfer stock, &c., if it rests in covenant and is purely voluntary, this Court will not execute that voluntary covenant; but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this Court."

This rule has been recognized and acted upon in all the subsequent cases, but a considerable diversity will be found amongst them, as to what does or does not constitute the relation of trustee and *cestui que trust*.

In order to render the observations I am about to make more clear, I shall first exclude from them the consideration of all these cases, where the donor has created a debt in favour of a volunteer, as by executing

(a) 6 Ves. 662.

a bond or a covenant to pay a sum of money. In these cases, though the obligee or the covenantee should be constituted trustee for the donee, and even if the trustee so constituted should decline to act or to enforce payment of the debt, the Court will enforce it, as in the case of *Fletcher v. Fletcher (a)*. In these cases, the relation of trustee and *cestui que trust* is clearly complete, and the interposition of the trustee alone prevents the donee from enforcing payment of the debt at law, against the debtor or his representatives. I omit, therefore, as not applicable to the question before me, those cases, where a donee has created a liability in himself, for the purpose of giving to another the benefit arising from it. The question before me will depend more upon those cases, where the donor professes to assign, for the benefit of the donee, some previously existing *chose in action*.

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On this subject some points are, I think, reasonably clear. If a person possessed of stock execute a declaration of trust of that stock in favour of a volunteer, he would, I apprehend, clearly constitute himself a trustee for the volunteer, and equity would execute the trust and compel a transfer of the stock to the *cestui que trust*.

But if the same person executed an assignment of the stock in favour of the volunteer, and no transfer of the stock took place, this, I apprehend, would as clearly be considered to be no more than an imperfect gift, in which the donor had not done all that it was in his power to do, and the donee would get no assistance from a Court of Equity to compel a transfer of the stock.

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(a) 4 Hare, 67.

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On the other hand, if the stock stood in the names of trustees, and the beneficial owner of it executed, in favour of a volunteer, an assignment of such stock, and if notice of that assignment were given to the trustees, who acknowledged the validity of it and acted upon it, they would thereupon, through the act of the beneficial owner, become the trustees for the volunteer, and equity would enforce the due performance of that trust in his favour.

Up to this point, I think that no considerable difficulty arises, but to what extent an assignment of a *chose in action* by the beneficial owner, in favour of a volunteer, will be binding without such notice or such acts by the trustees, is, I think, doubtful on the authorities. They all proceed on this principle:—that the relation of trustees and *cestuis que trust* must be created between the persons who were before the assignment trustees for the assignor and the volunteer assignee. Upon this principle, as Lord *Cottenham* observes, Sir *William Grant* proceeded in the case of *Sloane v. Cadogan* (a), which has been the subject of so much comment, as did Sir *John Leach* in the case of *Fortescue v. Barnett* (b). But with respect to the acts or circumstances which will make the relation, it is not, I think, easy to reconcile all the authorities. In *Meek v. Kettlewell* (c), a most acute and careful Judge, after much consideration and a minute examination of all the authorities, decided, that where a person entitled to the contingent reversion of a fund vested in trustees on various trusts, assigned all her interest in that fund to her son-in-law, and declared the trusts of the assignment to be, in part for herself, and as to the residue to her son-in-law, but of

(a) 3 *Sugd. Vend.* 10th ed. App. 66.(b) 3 *Myl. & K.* 36.(c) 1 *Hare*, 464.

of which assignment no notice was given to the trustees, the relation of trustee and *cestui que trust* was not created, and that equity would not enforce or execute the trusts of that assignment, and this decision was affirmed, on appeal, by Lord *Lyndhurst* (a). This, it is to be observed, was the assignment of a mere expectancy in a *chose in action* not communicated to the trustees in whom the legal interest was vested.

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In *Fortescue v. Barnett* (b) Sir *John Leach* held, that the voluntary assignment of a policy of assurance on the life of the assignor, of which no notice was given to the insurance office, entitled the assignees to the benefit of the policy.

In *Antrobus v. Smith* (c) Sir *William Grant* held, that an indorsement on a receipt for subscription to shares in the *Forth and Clyde* Navigation, expressing that the donor thereby assigned them to his daughter, not being a legal assignment, conferred no interest; and the same principle was followed by Lord *Cottenham* in *Edwards v. Jones* (d), with respect to a bond where the bond had been delivered to the assignee.

In *Blakely v. Brady* (e) Lord *Plunkett* held, that an assignment of a note for a sum due to the donor for a third person, accompanied with the delivery of the note to the donee, and the execution of an irrevocable power of attorney, constituting the donee his attorney for the recovery of the debt, created the relation of trustee and *cestui que trust*, and enforced the execution of the trust against the legal personal representatives of the donor.

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(a) 1 *Phillips*, 342.  
(b) 3 *M. & K.* 36.  
(c) 12 *Ves.* 39.

(d) 1 *M. & Cr.* 226.  
(e) 2 *Dr. & Walsh*, 311.

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One of the latest cases on this subject is the case of *Kekewich v. Manning* before the Lords Justices (a). The case was this:—A lady entitled to the reversion in stock, subject to the life estate of her mother therein, and which stock was standing in the joint names of her mother and her daughter, assigned her interest in this stock, on her marriage, to trustees, in trust for herself for life, remainder to her husband for life, and after their decease, in trust for the issue of the marriage and the issue of a niece, according to appointment; and in default of issue of the marriage, in trust for the niece of the settlor. No transfer of the fund took place, but the mother had notice of the settlement. There was no issue of the marriage, and the Court executed the trust in favour of the niece. Assuming that the deed, as regards her, was voluntary and not supported by the marriage consideration, which point, however, the Court did not decide, it is, I think, distinguishable, in some respects, from the other cases, where it was held, that no relation of trustee and *cestui que trust* existed; but if some of the expressions to be found in the judgment of the learned Judges, as there reported, are to be taken according to their full force, it is difficult to reconcile the same with the decision in *Beatson v. Beatson* and with *Messers v. Kettlewell*. In all these cases, however, the principle in *Ellison v. Ellison* has been adopted, and the variation has been, as to the peculiar circumstances, which have been considered sufficient or insufficient to make the relation which will induce this Court to act.

In applying the principle so enunciated to the present case, one very material observation occurs in the threshold, viz. that the Plaintiff, the assignor, does not,

(a) 1 De G. M. & G. 176.

not, by the deed, propose to create the trustees of the fund trustees for the *cestui que trust* under the deed, which distinguishes this case from many of those to which I have referred; but in this case, *John Gunter Bridge*, *Thomas Bridge*, *Robert Bridge* and *Alfred Charles Bridge*, being the trustees of the will, in whom the legal interest in the funds assigned was vested, of whom the three last are survivors and parties to this suit, the deed creates *John Edward Bridge*, *Alexander Gordon*, and the Plaintiff himself, trustees of this deed.

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I pause for a moment to express my opinion, that nothing turns on the circumstance that the Plaintiff constituted himself one of these trustees. In my view of this particular case, the question must be regarded in exactly the same manner, whether the Plaintiff or a stranger had been the third trustee. This being so, there being four trustees of the will in whom the legal interest was vested, and the beneficial owner having assigned over the funds to three persons, in trust for certain persons as volunteers, no transfer is made to the new trustees so appointed, nor is there any reason, as there was in *Kekewich v. Manning*, why the transfer should not have been made. In *Kekewich v. Manning* the original trusts were not exhausted, but the life estate of the mother continued in the stock, and until her death no transfer could have been made. The assignor had done all she could do. That is not so in this case. The trustees of the deed of settlement did not do anything inconsistent with the trusts which remained to be performed under the testator's will, and the trustees of the will seem not to have been advised to resist making any transfer to the trustees of the deed, until the settlor had attained his age of twenty-five years.

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Upon consideration of the above authorities, I am of opinion, that the relation of trustee and *cestui que trust* cannot be considered to have been constituted, in the absence of any transfer, which may have vested in the trustees of the deed the legal interest in the *choses in action* assigned.

The true construction of the deed seems to me to be, that until that transfer took place, the relation of trustee and *cestui que trust* was not to arise, and that until it did arise, it was only an imperfect gift, which this Court would not interfere to complete or create.

I proceed therefore to inquire, how far this relation has been created by the actual transfer of the legal interest in these funds to the trustees of the deed. The present property comprised in the deed, and which is proposed to be assigned, is the following:—300 shares in the General Mining Association; 20 *Regent's Canal* shares; 30 *Columbian* bonds; 12,694*l.* 11*s.* 3*d.* consols; 475*l.* 10*s.* 10*d.* cash at Messrs. *Coutts'* bank.

This property has been dealt with in the following manner. On the 4th *May*, 1847, the 300 shares in the General Mining Association were transferred by the executors of the testator to the trustees of the deed of the 9th *April*, 1847; and it appears, by an entry in the books of the company, that these three trustees are the owners of these shares. The twenty *Regent's Canal* shares have also been transferred to and are now vested in the Plaintiff and the other two trustees of the indenture of 9th *April*, 1847. It appears from the evidence before me, that the *Columbian* bonds pass by delivery, and that the actual holder is treated as the beneficial owner of them by the *Columbian* Government and its agents.

agents. Of these, no transfer or delivery has been made to the trustees of the deed or to any one of them. On the contrary, these bonds, having been originally in the custody of *John Gunter Bridge*, were, on his decease, transferred into the custody of *Alfred Charles Bridge*, another of the executors of the testator, in whose possession they now are. The consols are also standing in the names of the four original executors, and the cash balance at the bankers' stands to the account of *Thomas Bridge, Robert Bridge* and *Alfred Charles Bridge*, the three surviving trustees and executors of the testator's will.

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The result, therefore, which in this state of circumstances, I have come to, with regard to the personal property comprised in the indenture of 9th April, 1847, is obvious from the previous observations I have made. So far as regards the 300 shares in the General Mining Association and the twenty *Regent's Canal* shares, I am of opinion, that the relation of trustee and *cestui que trust* was created; that the Plaintiff and the two Defendants, his co-trustees, hold these shares upon the trusts of the indenture of 9th April, 1847, which they are bound to carry into effect, and which, if necessary, and upon a proper application for that purpose, this Court would enforce; that so far as regards the *Columbian* bonds, the 12,694*l.* 11*s.* 3*d.* consols and the cash balance, no such trust has been created, and that the Plaintiff is entitled to have the same transferred and paid to him.

With regard to the real estate comprised in the deed of 9th April, 1847, I am of opinion, that if no estate passed to the trustees under the deed, the relation of trustee and *cestui que trust* was not created, and that the

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the deed was inoperative, so far as it relates thereto. To determine this point it is necessary to consider what estate the Plaintiff had in him at the time of the execution of the indenture. I am of opinion that his interest was merely equitable, and that under the trust of his uncle's will, until he attained the age of twenty-five years (which he had not then done), the legal estate in all the real estate was vested in the trustees named in that will. I am of opinion, therefore, that the indenture of *April*, 1847, cannot operate as a conveyance of any legal estate to the trustees of the deed. I am also of opinion, that it can have no operation as a declaration of trust of this property, inasmuch as it did not, as I have already remarked, purport to make the trustees of the will trustees to the donees under this indenture.

My decree, therefore, will be, to dismiss the bill so far as the same prays any relief in respect of the shares in the General Mining Association and in respect of the *Regent's* Canal shares, to declare that the deed is inoperative, so far as it seeks to affect the real estate to which the Plaintiff is entitled under the will of his uncle, or any interest therein, and then direct the Defendants, the surviving trustees and executors, to transfer the *Columbian* bonds and the 12,694*l.* 11*s.* 3*d.* consols and 475*l.* 10*s.* 1 *Od.* cash balance to the Plaintiff. The costs of all parties must be paid. The trustees and executors will be paid their costs, as between solicitor and client, out of the trust fund remaining in their hands; the trustee of the deed of 9th *April*, 1847, and the *cestuis que trust* of that deed, other than the Plaintiff, out of the trust funds now subject to the trusts of that indenture, the trustees as between solicitor and client, and the others as between party and party. I make no directions respecting the Plaintiff's

Plaintiff's costs, as he will deduct them out of the property transferred to him, and I think that he cannot properly throw any portion of these costs on the funds, which, according to my decision, are still subject to the trusts of the indenture of 9th April, 1847.

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THOUGH the facts of this case are very fully stated in the judgment of the Court, the following short abstract of the circumstances will be useful:—

The Plaintiffs were equitable mortgagees of the shares of J. H. in the Woollen Cloth Company, and the *Dhobah* Company were general creditors of J. H. Both companies having notice of the Plaintiff's rights, the *Dhobah* Company commenced proceedings in the Lord Mayor's Court, and attached the dividends on the shares in the hands of the Woollen Cloth Company. The same solicitor was employed

James Hay was possessed of 150 shares, of 100*l.* each, in the Patent Woollen Cloth Company of *Leeds*, a joint stock company constituted by deed of settlement. The deed provided, that the shares should not be transferable, except with the consent of a board of directors. It contained the usual provisions for registering the shares in "The Share Registry Book," and provided that, notwithstanding any assignment, the receipt of the registered shareholder should be a good discharge, and that the Share Registry Book should be conclusive evidence of the proprietorship of any shares.

In 1846, *James Hay*, being indebted to the Union Bank of *Scotland*, deposited his 150 shares with them, as a security, with authority to sell them.

for both companies, and two persons were directors in both companies. No defence was made, and the *Dhobah* Company obtained payment. Held, first, that the Plaintiffs could not recover them back from either company; but, secondly, that the *Dhobah* Company could not avail themselves of a similar attachment in the Lord Mayor's Court, obtained pending this suit; and, thirdly, that the Plaintiff was entitled to a receiver of the future dividends.

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In *April*, 1848, Mr. *Hay*, being about to go to *India*, appointed Messrs. *Anderson*, two of the law agents of the banking company, his attornies, to sell the shares and receive the dividends, and he also executed to them a transfer of the shares.

Notice of the power of attorney was held by the Court to have been given to the Cloth Company on the 19th of *October*, 1848, but no notice of the equitable mortgage of 1846 was given to the Cloth Company until the 14th of *May*, 1850. Two dividends, of 378*l.* each, were declared on Mr. *Hay's* shares, and which became payable in *April*, 1849, and *April*, 1850, respectively.

Mr. *Hay*, being indebted to the *Dhobah* Sugar Company, the Defendants *Kemshead* and *Stewart* (two of its directors), acting by Messrs. *Roy*, their solicitors, commenced a suit against Mr. *Hay* in the Lord Mayor's Court, on the 5th of *September*, 1848, for the purpose of attaching all his monies, &c., in the hands of the Woollen Cloth Company, and they served their secretary with notice of the attachment as garnishees. He pleaded *nil habet*, and the proceedings were thereupon discontinued. However, on the 26th of *June*, 1850, the Defendants *Kemshead* and *Stewart*, as directors of the *Dhobah* Sugar Company, issued a second attachment against themselves (*Kemshead* and *Stewart*) and five other of the Defendants, as directors of the Woollen Company, attaching the monies of *Hay* in their hands. The garnishees made no defence, and judgment was recovered against them on the 22nd *July*, 1850, awarding 756*l.* (being the two dividends on *Hay's* shares), and that sum was thereupon paid by the Woollen Company to *Kemshead* and *Stewart*.

A further dividend was declared, and *Kemshead* and *Stewart*

Stewart recommenced the same process in the Lord Mayor's Court, but they were stopped by the present suit, filed on the 22nd *April*, 1851, by the *Scotch* bank against them, against the five other directors, and against *Hay* and the *Andersons*. The bill prayed a declaration, that the Plaintiffs were entitled to the 150 shares, and for repayment by the directors of the *Dhobah* Company of the 756*l*.

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Mr. *R. Palmer* and Mr. *Cairns*, for the Plaintiffs. The Plaintiffs, as equitable mortgagees, by virtue of the memorandum of deposit of 1846, have a better title to the shares and their produce than the *Dhobah* Company. It is said, that the Cloth Company were not bound to notice an equitable assignment of shares, and that they were not assignable. That is not the law; even the profits of a college fellowship are assignable in equity, and the college cannot disregard such an assignment, *Feistel v. King's College (a)*, where the Court granted a receiver of a college fellowship. After the dividends had been declared, they became the separate money of each shareholder, to be dealt with as he pleased, *Carlisle v. South-Eastern Railway Company (b)*. The *Dhobah* Company had notice of the Plaintiffs' rights, at all events on the 14th of *May*, 1850; and they could not, with such notice, acquire any interest in the shares as against the prior incumbrancers. Secondly, the proceedings in the Lord Mayor's Court were fraudulent and collusive. *Kemshead* and *Stewart* were directors of both companies, and Messrs. *Roy* were solicitors for both parties litigant. The Cloth Company, instead of making a proper defence, admitted the title, as against absent parties, and they must take the consequences. Third parties cannot be bound by judicial

(a) 10 *Beav.* 491.

(b) 1 *Macn. & Ger.* 689.

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cial proceedings in their absence, and such a judgment is wholly inoperative as against them; *Fordyce v. Bridges* (a); *Norris v. Wright* (b). Thirdly.—It was the duty of the company to make a proper defence; they were trustees for the Plaintiffs, *Pintlett v. Wright* (c), and might have pleaded *nil habent* and set up the assignment of which they had notice. A debt cannot after assignment be attached; 2 *Bacon's Ab., tit. Cuiusmodi* (d); *Lewis v. Wallis* (e).

Mr. Campbell and Mr. Nichols, for the Patent Woollen Company, and Mr. Glasse and Mr. Cole, for the *Dhobah* Sugar Company. The deposit of the shares was not binding on the company, for by the deed of settlement, which regulated the rights of the shareholders and all claiming under them, the registered owners alone could be recognized. The Plaintiffs were bound to give notice to the Cloth Company, and ought to have taken proper steps to complete their security by becoming shareholders. They deliberately abstained from so doing, after notice of the pending proceedings in the Lord Mayor's Court, in order to avoid the responsibilities of shareholders and the liabilities to calls. The *Dhobah* Company has obtained a better title by their superior diligence.

Secondly.—This is an attempt by an equitable mortgagee to obtain an account of back income, which has never been allowed; *Ex parte Wilson* (f); *Gresley v. Adderley* (g); *Ex parte Carlon* (h); *Ex parte Burrell* (i); even after notice to the tenants against a receiver in possession, *Thomas v. Brigstocke* (k).

If

(a) 10 Beav. 90, and 2 Phillips, 497.  
 (b) 14 Beav. 291.  
 (c) 2 Hare, 120, and 12 Cl. & F. 764.  
 (d) Page 595.

(e) *Sir T. Jones*, 222.  
 (f) 2 Ves. & B. 252.  
 (g) 1 Swanst. 573.  
 (h) 3 Mon. & Ayr. 328.  
 (i) *Ibid.* 439.  
 (k) 4 Russell, 64.

If *Hay* had become bankrupt the shares would have been within his order and disposition. The proceedings in the Lord Mayor's Court are binding on the Plaintiffs. They had notice of them and might have appeared under the power of attorney. The proceeding completely exonerates the garnishee, *M<sup>r</sup> Daniel v. Hughes* (a). The order of another Court of competent jurisdiction is a full protection to the parties acting in obedience to it, *Henderson v. Henderson* (b).

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Mr. R. Palmer, in reply.

The MASTER of the ROLLS referred to *Whitworth v. Gaugain* (c), and said he would consider the case.

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*The MASTER of the ROLLS.*

This is a suit instituted by the Union Bank of Scotland against the directors of the *Dhobah* Sugar Company, the Patent Woollen Cloth Company of Leeds, and *James Hay*. The object of it is to enforce a security which the Plaintiffs have obtained from the Defendant *James Hay*, upon his shares in the Patent Woollen Cloth Company, against all persons claiming any interest therein; and the question principally relates to the dividends which have accrued due on these shares previously to the filing of the bill.

Nov. 5.

On the 7th of October, 1846, the Defendant *James Hay* applied to the Union Bank of Scotland to advance him a sum of money on his promissory note for 4,121l. 10s. at six months' date. As a security for the repayment of this sum, he proposed to deposit certificates

(a) 3 *East*, 367.(b) 3 *Hare*, 100.(c) 3 *Hare*, 416, and 1 *Phil.* 728.



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cates of 150 shares held by him in the Patent Woollen Cloth Company. This was accordingly done, and *James Hay*, besides making this deposit of the certificate for shares, signed a memorandum of deposit of the same date, which was addressed to the manager in the following words:—"Sir, The Union Bank of *Scotland* having this day discounted my promissory note at six months date for 4,121*l.* 10*s.*, I beg to deposit with you, as collateral security to the bank, 150 shares of 100*l.* each in the Patent Woollen Cloth Company of *Leeds*, 60*l.* per share paid, to represent 9,000*l.*; and I authorize you to hold the same until repayment by me of the said note, with power to you, in default of such repayment, to sell these shares for such price as you can obtain and in such way as you think most expedient, and to apply the proceeds in the bank's repayment, you accounting to me for any balance of price which may remain in your hands, and I, on the other hand, being bound to make good to you any deficiency, should the shares not realize the full amount of my engagement to the bank, with any expenses that may be incurred by you."

In *April*, 1848, Mr. *Hay*, being then about to leave this country for *India*, and the whole of the money advanced to him, with the exception of 600*l.* which had been repaid, being due to the Union Bank, he executed a power of attorney (which being for value was irrevocable), by which he constituted two of the Defendants, the law agents and nominees of the bank, his attorneys to sell these shares, when and at such prices as they should think fit, and to receive all dividends which might accrue due upon them. And at the same time, he executed and delivered to these gentlemen a transfer of the 150 shares.

On the 19th *October*, 1848, notice was given, in writing,

writing, to the secretary of the Patent Woollen Cloth Company, that Mr. *Hay* had executed a power of attorney, enabling these gentlemen to receive the dividends, but not stating anything respecting the assignment which the Union Bank had on these shares. This letter was answered by Messrs. *Roy & Co.*, the solicitors to the Patent Woollen Cloth Company, on the 28th of the same month, stating, that the dividends had hitherto been retained against calls, made for the purpose of paying off debts; and also stating, that an attachment had been laid on these shares, in respect of calls due from Mr. *Hay* to the *Dhobah* Sugar Company, "so that, we apprehend, you must necessarily leave Mr. *Hay's* interest as it stands, till he has discharged this attachment." This passage in Messrs. *Roy's* letter referred to an ineffectual attempt made in the Lord Mayor's Court, in the previous month of *September*, to effect such an attachment, but which came to nothing and was abandoned.

In reply to this letter, the agents of the Union Bank wrote to Messrs. *Roy* on the 16th *November*, 1848, asking the date of the attachment and requesting their private opinion as to the effect of the attachment in giving a preference over the other creditors of Mr. *Hay*, and particularly those who had obtained an assignment of the shares in question. In answer to this, Messrs. *Roy*, on the 4th of *December* following, state, that the attachment was of recent date, about *October* last, and "if the assignment of the shares were regular and registered, it would transfer the ownership and defeat the attachment." Nothing further appears to have been done between any of the parties concerned till the month of *July* in the following year. It is stated, that a dividend was expected to be paid by the Woollen Cloth Company

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1852. in *September*, 1848; and it is stated, in the answer of the Patent Woollen Cloth Company, that a dividend of 378*l.* was declared and became payable by the company on the 10th *April*, 1849, and a second dividend of the same amount in the month of *April*, 1850, amounting together to 756*l.*

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In the meantime and in the month of *July*, 1849, the directors of the *Dhobah* Company wrote to Mr. *Hay* in *India*, and requested him to transfer to them his share in the Woollen Cloth Company, and they informed him that some dividends having been declared by the Cloth Company, they had lodged a detainer against the amount due on his shares. In *September*, 1849, Mr. *Hay* returned an answer (which was probably received about the beginning of *December* following) stating, that if they would apply to Messrs. *Anderson* and *Wood*, *Castle Street Edinburgh*, they would obtain information, showing their error in having detained the dividend referred to.

Up to the month of *February*, 1850, no notice appeared to have been given by the Plaintiffs, or by any person on their behalf, of the claim of lien on the share of Mr. *Hay*, to the Patent Woollen Cloth Company either directly or to any agent or solicitor of theirs; nor does it appear, whether the directors of the *Dhobah* Company applied for information to Messrs. *Anderson* and *Wood*, as suggested by Mr. *Hay's* letter. However, in the month of *February* following, one dividend having been declared and another expected, amounting together to 756*l.*, and there being then a fund to be contended for, a negotiation took place between the different parties, in the course of which, it is established by the evidence of Mr. *Cobb*, that at least on, if not before the 14th day of *May*, 1850, he informed Messrs. *Roy & Co* (who were the solicitors both of the Woollen Cloth Company and of the *Dhobah* Company)

pany and of the *Dhobah* Sugar Company), that the Union Bank of *Scotland* claimed to be entitled to the shares of Mr. *Hay*, and that a power of attorney for the sale of the shares and an assignment of them had been executed by him to Messrs. *Anderson*, the law agents of the Union Bank. The value and importance of this notice is a matter to be weighed hereafter; but the fact of the notice having been given in *May*, 1850, is, in my opinion, established, and it is, I think, notice to both the companies of these facts.

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It is suggested by the Patent Woollen Cloth Company, in their answer, that Messrs. *Roy & Co.* was, in this negotiation, acting solely on account of the *Dhobah* Sugar Company, and that consequently, the information received by them, in that character, could not be considered as information given to the Patent Woollen Cloth Company; but I do not accede to that view of the case, and it appears to me, that the information was given to and received by them as much in one character as in the other, and Mr. *Roy*, who is examined as a witness in the cause, does not deny such notice; in truth he is not examined to dispute the fact of such notice having been given, either actually or constructively, to the Patent Woollen Cloth Company on or before 14th *May*, 1850.

On the 28th *June*, 1850, these negotiations came to a close, without arriving at any satisfactory conclusion, and on the 26th of that month, the directors of the *Dhobah* Sugar Company issued an attachment against the dividends of 756*l.* in the hands of the Patent Woollen Cloth Company, and on the following day, the judgment was completed; the sum of 756*l.* was then taken in execution, and paid by the Patent Woollen Cloth Company to the *Dhobah* Sugar Company.

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On the 10th *August*, 1850, a third dividend of a like amount of 378*l.* was declared on the shares of *James Hay* in the Patent Woollen Cloth Company, and declared to be payable in the month of *April*, 1851.

In *September*, 1850, a proceeding, similar to that which I have already stated, was commenced in the Lord Mayor's Court by the *Dhobah* Sugar Company; but before this could be perfected, and on the 22nd *April*, 1851, this bill was filed and an injunction obtained, to restrain the Patent Woollen Cloth Company from paying over this third dividend until the hearing of the cause.

The question principally argued before me was, whether, in the circumstances of this case, the Plaintiffs are entitled to require the directors of the Patent Woollen Cloth Company to make good and repay to the Plaintiffs this sum of 756*l.*, the amount of the two first dividends so paid by them to the *Dhobah* Sugar Company. The grounds on which this was contended for were, first, that while the dividends remained unpaid in the hands of the Patent Woollen Cloth Company, the right of the Plaintiffs to them was preferable to that of the *Dhobah* Company, and that priority and possession of the money was, in truth, given to the *Dhobah* Company by fraud and collusion. The circumstances which are relied upon to induce the Court to come to this conclusion are the following:—First, that the Defendants Messrs. *Kemshead* and *Stewart* are the trustees and directors of the *Dhobah* Sugar Company, and that the same two gentlemen are, together with the next five Defendants on the record, the Directors of the Patent Woollen Cloth Company. Secondly, that Messrs. *Roy & Co.* were and are, and acted throughout the whole transaction, as the solicitors for both the companies. Thirdly,

**Thirdly**, that in the action in the Lord Mayor's Court, **Messrs. Roy & Co.** acted as the solicitors of the **Plaintiffs** and of the garnishees in that action; and that accordingly, the Patent Woollen Cloth Company, the garnishees in the action, did not plead *nil habent*, as they ought to have done, and as they did in fact, in respect of the dividends which had accrued due and which had formed the subject of the abandoned proceedings in *September, 1848*.

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Upon the first point, I am of opinion, that in the absence of all proceedings, the right of the **Plaintiffs** to the dividends in the hands of the Patent Woollen Cloth Company, which had accrued due on the shares of **Mr. James Hay**, was preferable to that of the *Dhobah Sugar Company*. The **Plaintiffs** were as much equitable incumbrancers or mortgagees of the shares and dividends as **Mr. Hay** could make them, and the *Dhobah Sugar Company* were merely general creditors of **Mr. James Hay**, having no right or title to these shares over and above what every creditor has to the property of his debtor. But although I have formed this opinion, I have also come to the conclusion, that the Defendants in these proceedings did nothing more than they were entitled to do, and that no equity exists to compel any of them to make good or refund the amount of these two dividends. That **Messrs. Roy** were actively endeavouring to gain for their clients the dividends in the hands of their clients the Patent Woollen Cloth Company, at a time when they knew that the **Plaintiffs** claimed to be entitled to these dividends, is, I think, the strongest mode in which it can be put in favour of the **Plaintiffs**; but I look in vain through the proceedings, to discover any fact that can induce me to come to the conclusion, that the **Plaintiffs** were induced to forbear prosecuting any means in their power to

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to obtain the dividends, by any representations of the Defendants, or of the Messrs. *Roy & Co.*, their solicitors, or of any agent of theirs. The only circumstance that bears that way, in the slightest degree, is the letter of the 28th of *October*, 1848, stating that an attachment had been laid upon the shares of Mr. *James Hay*, and the dividends, if any, by the *Dhobal Sugar Company*, so that, says the writer:—"We apprehend you must necessarily leave Mr. *Hay's* interest as it stands, till he has discharged this attachment.' And it is alleged in the bill, that the Plaintiffs were induced by this letter to believe, that an attachment lay upon these shares, which would affect all the further dividends arising from them. But I cannot attribute any serious consequences to the impression which may have been produced by the statements contained in this letter: first, because no evidence is adduced to show, that the Plaintiffs were under any erroneous impression as to the facts which had occurred, or with respect to the effect, at law, of such attachment; and secondly because even if the statement contained in that letter which I have read, should be considered incorrect, and made originally with a view to deceive, the effect of it was removed by the letter of Messrs. *Roy & Co.*, or the 4th of *December*, 1848, which correctly informed the Plaintiffs, that by acting on their assignment they might defeat the attachment.

The Patent Woollen Cloth Company say, that they are not and were not bound to take notice of any one, not a registered owner in their books of shares in their company, and they deny that any right to or interest in shares in this company is, or can be, vested in any one except such persons as having, according to the form of the company, entitled themselves to be treated as the  
 owners

owners. The Plaintiffs, no doubt, would willingly have availed themselves of their assignment, and have acted upon it, if they could have done so without thereby incurring the liabilities which attach to an owner of the company. Being bankers, they of course declined to incur any such risk, but they contend, that having an assignment of these shares, and having given notice of it to the company, although they refuse to act upon it and thereby constitute themselves the legal owners of the shares, yet that the company is bound to acknowledge their claim, to the extent of giving them the dividends above all other claimants, i. e., of giving them all the advantages which can arise from the ownership, without fixing them with any of the disadvantages, in the shape of liability which may attach to such ownership. I am not of that opinion. I think that until the Plaintiffs took some active steps, either at law or in equity, to enforce their right to the dividends on these shares, the Patent Woollen Cloth Company was not bound to regard an assignment, which the assignees declined to act upon.

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Neither am I of opinion, that the Patent Woollen Cloth Company ought to have pleaded *nil habent* to the suit instituted in the Lord Mayor's Court. In my opinion, they could not have pleaded so correctly. On the former occasion, in 1848, when the company did so plead, it was because the dividends declared on *Hay's* shares had been taken by the company to answer the liabilities of *Hay* and the company, and therefore, when they made this plea, nothing was, in fact, remaining in their hands payable to *James Hay*. So also, if, prior to the attachment in the Lord Mayor's Court, the Patent Woollen company had paid these dividends over to the Plaintiffs, they might then have correctly pleaded *nil habent*; and if they had chosen so to do, they might have



1852. have given priority to the Plaintiffs, and defeated the attachment. But with what truth could such a plea have been made in *June*, 1850? there was then a sum of 756*l.* due to *James Hay* in their hands. That the *Dhobah* Company recovered it instead of the Plaintiffs, the Union Bank, is simply because the Union Bank did not take the steps, which a year later they did take, to prevent the execution, obtained in the Lord Mayor's Court, from sweeping off the dividend.

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It appears, at first sight, a material circumstance, that the directors of the *Dhobah* Sugar Company are also two of the directors of the Patent Woollen Cloth Company; but I see no evidence to convince me, that these directors have induced the other directors of the Patent Woollen Cloth Company to do or sanction anything, which they could not have done otherwise, or act differently than if they had not been directors of it. I see no evidence of the suggestion of anything false, beyond what I have already commented upon, made by any one; and I see no evidence of the suppression of anything true. The facts, on all sides, appear to me to have been well known to all the parties concerned; but the Plaintiffs, not having taken such active steps as they might then have taken, have, in my opinion, lost the 756*l.* which was paid over to the *Dhobah* Sugar Company.

It was not, in my opinion, incumbent on the Patent Woollen Cloth Company to raise or litigate the question of the right of the Plaintiffs, who might themselves have done so by adopting the course they took a year later. Nor, if the Patent Woollen Cloth Company had done so and failed, could they, in my opinion, have required the Plaintiffs to pay them the costs incurred in any such litigation.

**If** I am right in this view of the case, and if they were **neither** bound to plead *nil habent*, nor justified in doing **so**, they had no answer to the execution, which would **have** been levied upon them if they had not paid the 756*l*. **Neither**, in my opinion, was it incumbent on the Patent Woollen Cloth Company to take the step which could **have** justified them in pleading *nil habent*, viz. that of **previously** paying over the dividends to the Plaintiffs; **and** the more so, because I have not been able to discover, **throughout** the evidence, that any formal demand was, **at any time** prior to the attachment, made to the Patent Woollen Cloth Company, by the Plaintiffs, to pay the 756*l*. to them. I am far from saying, that, had they **done so**, it would have altered my opinion on this subject; but it is a circumstance to be considered, that **they did not** make this demand, or give notice to the Patent Woollen Cloth Company not to pay over this sum of money to the *Dhobah* Sugar Company. The Plaintiffs were, in fact, equitable incumbrancers on the shares, with a power, if they thought fit, to make themselves the legal owners, or to obtain possession of the profits arising from them, by application to this Court for the appointment of a receiver. They have not thought fit to do so, and the consequence has been, that more active creditors, by means of the process in the Lord Mayor's Court, have taken this sum in execution; and it is not, in my opinion, now to be got back, either from the Patent Woollen Cloth Company or from the *Dhobah* Sugar Company.

The result of my opinion, therefore, so far as regards the two dividends amounting to the sum of 756*l*., is, that the Plaintiffs are not entitled to recover them, and that the bill must be dismissed so far as regards that claim.

With respect to the future dividends, the Plaintiffs  
are

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are entitled to have a receiver, who will receive the dividends hereafter to accrue due. Nor, as I understand it, is this right contested by the Defendants; but if it be, I shall have no hesitation in declaring it, and appointing a receiver accordingly.

With respect to the dividends now in the hands of the Patent Woollen Cloth Company, more doubt and question arises; this has been arrested, by the injunction of this Court, before execution under the judgment in the Lord Mayor's Court could be levied upon it; but I am of opinion, that as this dividend has not been parted with, but still remains in the hands of the Patent Woollen Cloth Company, upon the principle laid down in *Whitworth v. Gaugain* (a), the Plaintiffs are entitled to receive it, and that it cannot be taken by the *Dhobah* Sugar Company under the execution. I have treated it as in the hands of the Patent Woollen Cloth Company; but this sum, as I understand, has been recovered, and paid into Court by the *Dhobah* Sugar Company, under an arrangement made when the injunction was granted; it must, however, for this purpose, be treated in the same light as if it still remained unpaid by the Patent Woollen Cloth Company.

The decree therefore, will be, to appoint a receiver of the shares and of the dividends and profits now due (including the 378*l.* in Court), and to accrue due thereon, and to direct an account to be taken of what is due to the Plaintiffs for principal, interest, and costs, in respect of this claim, against the Defendant *James Hay*, and to direct a sale thereof; reserving further directions. The bill must be dismissed as against the *Dhobah* Company, and against the Patent Woollen Cloth

(a) 3 *Hare*, 416, and 1 *Phil.*, 728.

Cloth Company, so far as regards the two dividends amounting to 756*l*. The Patent Woollen Cloth Company must have their costs of the suit, which the Plaintiffs must be at liberty to add to their own costs. I shall dismiss the bill also, generally, against the *Dhobah* Sugar Company, as I apprehend that it will not be necessary to keep them before the Court for any ulterior proceedings in this cause, but without costs.

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Strictly speaking, they ought to receive the costs occasioned by the claim of the Plaintiffs relative to the 756*l*., and to pay those that were occasioned by their claim to the 378*l*.; but as I object to apportioning costs, when I can avoid doing so, I shall set one off against the other, and give none on either side. If the Plaintiffs will mention some person whom they think proper to appoint receiver, and give notice to the other side, if no objection is made, I will, in the decree, introduce that person's name as receiver, instead of requiring proceedings to be taken for this purpose before me or my clerk in chambers. If a contest arises, it must be done in chambers.

Reserve further directions and subsequent costs.

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## M'DONNELL v. HESILRIGE.

Dec. 6 &amp; 7.

A *feme sole*, in contemplation of a marriage with *T.*, vested personal property in trustees, upon trust for the sole benefit of herself, her executors, &c., until her marriage (if any), with subsequent trusts for her issue. She never married *T.*, but before her marriage with *M.* the trustees handed over to her a part of the fund. Held, that the settlement was irrevocable; that she had no power of absolute disposition until marriage; that the trusts were to arise on any marriage; and that the trustees had committed a breach of trust for which they were answerable.

ON the 15th of *March*, 1834, Miss *Hesilrige*, in contemplation of a marriage with Mr. *Taylor*, (which never took effect,) executed a settlement of her personal property.

The settlement, dated the 15th of *March*, 1834, was made between Miss *Hesilrige* of the one part, and two trustees, *Charles Hesilrige* and *Richard Johnson*, of the other part. It recited, that a marriage was in contemplation, but had not then been agreed upon, between *Isabella Hesilrige* and *John Taylor*, and that *Isabella Hesilrige* was possessed of certain property, and that she had advisedly determined and agreed (with full notice to *John Taylor* of her intention in that behalf) to assign the same, upon the trusts thereafter expressed. *Isabella Hesilrige* then assigned to *Charles Hesilrige* and *Richard Johnson* all the monies, stocks, funds and securities belonging to her, upon trust for the sole benefit of her *Isabella Hesilrige*, her executors, administrators, and assigns, until her marriage (if any) should be solemnized; or in case no such marriage should be solemnized, and from and after the solemnization (if any) of the same marriage, upon trust thenceforth, from time to time, during the life of *Isabella Hesilrige*, to retain and take the dividends, interest and income of the said trust-monies, and stand possessed thereof, in trust for the sole use of *Isabella Hesilrige*, and apart from and exclusive of *John Taylor*, or any other husband with whom she might happen to intermarry, with the usual restriction against anticipation; and after the

decease

decease of *Isabella Hesilrige*, in case she should marry and have issue, upon trust to pay the trust-monies among all the children of *Isabella Hesilrige*; and in case *Isabella Hesilrige* should not have any child, upon such trusts as she should appoint, and in default, for her next of kin, as if she had died intestate and unmarried.

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The fund (1,876*l.* consols) was transferred into the names of the trustees, "immediately after the settlement;" but before the following month of *August*, 1834, the trustees, at the request of Miss *Hesilrige*, and before her marriage, transferred 200*l.*, part of the consols, to her-

Miss *Hesilrige* did not marry Mr. *Taylor*; but on the 3rd of *September*, 1836, she married Mr. *M'Donnell*. She died in 1838, leaving the Plaintiff, *Isabella M'Donnell*, her only child, who, by this suit, claimed the fund, under the limitations contained in the settlement. She also sought to make the trustees liable for the 200*l.* paid over to her mother; and this raised the contest with the trustees.

Mr. *R. Palmer* and Mr. *C. Chapman Barber*, for the Plaintiff, argued, first, that the settlement, though voluntary, was complete, and therefore irrevocable. Secondly, that the first trust in favour of Miss *Hesilrige*, was limited to the period anterior to any marriage; and thirdly, that, upon the true construction of the settlement, the trusts were applicable to any marriage, and were not limited to a marriage with *Taylor*.

*Bill v. Cureton* (a); *The Countess of Strathmore v. Bowes* (b); *Page v. Horne* (c); *Beatson v. Bealson* (d).

Mr. *Roupell*

(a) 2 *Myl. & K.* 503.  
(b) 1 *Ves. jun.* 22.

(c) 9 *Beav.* 570; 11 *Beav.* 227.  
(d) 12 *Sim.* 281.

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Mr. *Roupell* and Mr. *Cory*, for the trustees, insisted that they were not liable for the 200*l.*, for the first trust was for Miss *Hesilrige*, her executors, administrators, and assigns, absolutely, until her marriage, and that therefore, until that event happened, she had an uncontrolled ownership over the property. Secondly, that the settlement was in contemplation of a particular marriage, and that the trusts were to arise on that event only. Thirdly, that the transfer, not being contemporaneous with the deed, the trust did not become effective.

*Thomas v. Brennan (a); Mitford v. Reynolds (b).*

Mr. *Welch*, for the next of kin mentioned in the ultimate limitation.

Mr. *Bovill*, for the husband.

*The MASTER of the ROLLS.*

I think there is no doubt as to the construction of the settlement. This is undoubtedly a voluntary deed, executed by a *feme sole*, and disposing of certain property to which she was absolutely entitled; but I do not concur in the view, that a voluntary settlement cannot be binding, unless the fund be transferred at the time of the execution of the settlement. The view I take is this:—Where the relation of trustee and *cestui que trust* has really arisen, and where a person has actually declared a trust of a fund intended to be transferred, the trust arises immediately the fund has been transferred. Here I have no doubt, that the voluntary settlement was complete, immediately on the fund being transferred; for then

(a) 15 *Law J. (N. S.) Ch.* 420. (b) 16 *Sim.* 130.

then the trustees held it on the trusts stated in the settlement.

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These being the trusts which I have now to execute, the next question is, what is the nature of them? With respect to the 1,676*l.*, there is no dispute; but the difficulty arises as to the 200*l.* sold out. It is an unfortunate case for the trustees; but I think, that, according to the plain construction of the instrument, the whole fund was settled, not only in the event of a marriage with *Taylor*, but of any marriage. The funds were transferred to the trustees on trust "for the sole benefit of *Isabella Hesilrige*, her executors, administrators, and assigns, until her marriage (if any)." On this it was contended, that the trusts until such marriage were for her absolutely, and that if no marriage with *Taylor* took place, she remained the owner, and that the subsequent trusts were to arise only in the event of that particular marriage taking effect. But I think it obvious, that the more natural construction is, that the trust was for her until her marriage (if any), and then upon the trusts which are after mentioned.

The subsequent trusts, however, show the matter more clearly; they are to arise "in case she should marry and have issue;" again, the trust for her sole use is exclusive of *John Taylor* and *any other husband*;" the next trust is, for her issue generally, whether by the then intended or any other marriage; the gift over is to arise, in case she "shall not have any children," that is, in case there shall be no child by any marriage; lastly, the property is then limited to such persons as she, notwithstanding her coverture "*by any husband*," shall appoint.

I am of opinion that the sale of the 200*l.* was not authorized, and that it must be made good, with interest from the time of Mr. *M'Donnell's* death.



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## FRAIL v. ELLIS.

Dec. 8 &amp; 9.

The consideration, as stated in a conveyance, was 150*l.* paid and an acceptance for 300*l.* Held, that the form of the deed was not conclusive, and that it was competent for the vendor to show, that he had stipulated for a lien for the amount of the acceptance.

*A.* conveyed an estate to *B.*, and, according to the conveyance, an acceptance was given "in full satisfaction for the absolute purchase," but in reality, it was agreed, that the vendor should have a mortgage for the money. Before the acceptance became due, *B.* mortgaged to *C.*, who employed the

THE Plaintiff *Frail* agreed to sell some property to the Defendant *Lloyd*, and accordingly by a deed, dated the 12th of *January*, 1850, *Frail* conveyed it to *Lloyd*. The consideration, as expressed on the face of the deed, was 150*l.* then paid, and the acceptance of *Lloyd* for 300*l.* at three months, at the same time delivered to *Frail*, "the receipt whereof he did thereby respectively acknowledge, and that the same were in full satisfaction for the absolute purchase" of the property. There was a receipt endorsed on the conveyance for the 150*l.* sterling, and the acceptance for 300*l.*, "being the full consideration money within mentioned to be paid."

In this transaction, *Levy* acted as the solicitor of both parties.

On the 5th of *February*, 1850, *Lloyd* mortgaged the property to *Ellis* for 350*l.* The bill of exchange became due on the 15th of *April*, and was dishonoured, and the property having been advertised for sale through *Levy*, the Plaintiff discovered the mortgage to *Ellis*.

He thereupon filed this bill against *Ellis*, *Lloyd*, and *Levy*, alleging that the agreement between him and *Lloyd* was, that he, the Plaintiff, should besides the bill, same solicitor as had been engaged in the purchase, and *C.* had notice that the bill had not been paid and of the form of the conveyance. Held, first, that *C.* was affected by the notice in his solicitor; and, secondly, that under the circumstances, he was bound to inquire into the true nature of the transaction between *A.* and *B.*, and consequently that his security ought to be postponed to *A.*'s.

bill, have a mortgage on the estate for the 300*l.*; that he had executed the conveyance, believing, from what had fallen from *Levy* on the occasion, that a mortgage had been executed; and that, by fraud and collusion, no such mortgage had been executed. As to *Ellis*, it alleged, that he had, by himself and through his solicitor *Levy*, notice of the Plaintiff's rights, and was bound by them. There was contradictory evidence, but it is proposed merely to refer to the conclusion to which the Court came upon it, as stated in the judgment, which was, shortly, that the Plaintiff had made out his case as to the terms of the agreement.

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The bill prayed a declaration, that the Plaintiff was entitled to an equitable charge on the property for 300*l.*, in priority of *Ellis*, and for consequential relief.

*Ellis* admitted that *Levy* acted as his solicitor, that he (*Ellis*) knew that the 300*l.* bill had not been paid, and that he understood that the 350*l.* was to be applied in its payment.

Mr. *R. Palmer* and Mr. *Haddan*, for the Plaintiff. A purchaser does not, by taking bills for part of the purchase money, lose his lien, 3 *Sugden's Vendors and Purchasers* (a); *Teed v. Carruthers* (b); but here there was a special agreement for a lien by mortgage, of which the Plaintiff has been defrauded. Secondly, *Ellis* is bound by the notice possessed by his solicitor *Levy*; besides, the form of the conveyance, and the knowledge of *Ellis* that the purchase money remained unpaid, imposed on him the obligation of inquiring of the Plaintiff, before he advanced his money. *Levy* is properly made a party to the suit, *Beadles v. Burch* (c).

Mr. *Roupell*

(a) Page 193, 10th ed. (b) 2 *Y. & Col. C.C.* 31. (c) 10 *Sim.* 332.

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Mr. *Roupell* and Mr. *Bush*, for *Ellis*. First.—The evidence shows, that the consideration was 150*l.* in money and a bill of exchange for 300*l.*; the Plaintiff has therefore no lien; *Mackreth v. Symmons* (a); *Winter v. Lord Anson* (b); *Clarke v. Royle* (c); *White v. Wakefield* (d); *Buckland v. Pocknell* (e); *Parrott v. Sweetland* (f).

Secondly.—*Ellis* cannot be affected by the solicitor's notice in another transaction, and which he would naturally conceal; *Kennedy v. Green* (g); *Hewitt v. Loosemore* (h). He is a purchaser without notice, and has the legal estate. All the notice that can be imputed to him is that contained in the deed, which expresses that the 150*l.* and 300*l.* had been given "in full satisfaction for the absolute purchase" of the property. This the Plaintiff cannot now contest as against *Ellis*.

Mr. *Lloyd*, Mr. *Southgate*, Mr. *Temple*, and Mr. *Forbes*, for Messrs. *Levy*.

*The MASTER of the ROLLS.*

The point I have to consider is, whether the ordinary lien of the Plaintiff, the vendor, is discharged. That involves two questions as against the Defendant *Ellis*; first, whether the original contract between the Plaintiff and the Defendant *Lloyd* was, to sell the property for 150*l.* and the bill of 300*l.*, or whether he contracted to sell it for 450*l.*, and agreed to take the 300*l.* bill as a security for the payment. In other words, whether the bill was a security for the unpaid purchase money, or a substitution

(a) 15 *Ves.* 329.  
 (b) 1 *Sim. & St.* 445.  
 (c) 3 *Sim.* 499.  
 (d) 7 *Sim.* 401.

(e) 13 *Sim.* 406.  
 (f) 3 *Myl. & K.* 655.  
 (g) 3 *Myl. & K.* 699.  
 (h) 9 *Hare*, 449.

substitution for it. If that question be determined in favour of the Plaintiff, the next question is, whether the Defendant *Ellis* had notice of the transaction, or advanced his money for valuable consideration without notice of it.

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On the first point, it is contended, that the form of the deed is conclusive, and that the conveyance is expressed to have been made in consideration of 150*l.* and the bill for 300*l.*, and that the receipt indorsed is to the same effect. I am of opinion that the form of the deed does not conclude the parties. I do not think it necessary to go into the authorities, for I am of opinion, that in accordance with all the cases, it is possible for the parties to show what the real nature of the contract was.

As to the observations which have been made as regards the evidence on the part of the Plaintiff, after reading it through, although there are slight inconsistencies, it appears to me, that, as to the material and substantial matters, it is perfectly consistent; and I am convinced, that the Plaintiff executed the conveyance of this property on the faith and assurance that a mortgage deed to secure the balance of the purchase money had been executed.

This completely destroys the effect of the deed executed at the same time, and shows that the Plaintiff did not agree that the bill for 300*l.* should be in substitution for the balance of the purchase money, but a security. It is therefore impossible to say, that the Plaintiff either entered into the contract or executed the deed, with the view or intention that the bill, whether good or bad, and whether paid or unpaid, was to

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be a substitution for the money. If so, there is an end of the first question.

Being of opinion that the Plaintiff has not lost his lien, the next question is whether *Ellis* had notice of it. He had distinct notice, through his solicitor, that the balance of the purchase money had not been paid, and that the contract for the purchase was not such, as to prevent the Plaintiff having a claim on the property. I cannot have any doubt, that on the principle laid down in *Kennedy v. Green (a)*, he was, from the form of this deed, and the bill not having come to maturity, bound to inquire of the Plaintiff, whether his lien for the purchase money had been discharged, or whether the contract was to take the bill as a substitution for the money. I have no doubt, that an independent solicitor would not have allowed him to advance his money, until he had ascertained that there was no lien, or that the loan was applied in discharge of it. *Ellis* knew that this bill had not been paid, for the money was raised with the object of paying it. I am of opinion that the Defendant *Ellis* had notice of the prior transaction, and it is therefore unnecessary to go into the question whether he had notice of the fraud committed on the Plaintiff.

I must declare that the Plaintiff's lien is the first charge, and make the usual decree for foreclosure against *Ellis*.

(a) 3 *Myl. & K.* 699.

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## CLIFTON v. ROBINSON.

**M**R. *HALDANE* moved to dissolve an injunction obtained *ex parte*, on the ground that the Plaintiff having suppressed material facts on his application for it (a).

Mr. *R. Palmer* and Mr. *Shebbeare*, *contrà*. The Plaintiff swears that he had forgotten the communication made to him in *August* last. This is an excuse for his omission to state it.

*The MASTER of the ROLLS.*

It is clear that this injunction must be dissolved, with costs. If the circumstance of a party having forgotten a material fact were a sufficient excuse in this case, it would be so in every instance. Dissolve the injunction, with costs.

*Jan. 27.*  
On an application for an *ex parte* injunction, a plaintiff omitted to state a material fact. A motion being made to dissolve it, the Plaintiff swore that he had forgotten the circumstance. Held, that it was no excuse for the suppression.

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(a) *Hilton v. Lord Granville*, 4 Beav. 130; *Hemphill v. M<sup>c</sup>Kenna*, 3 Dr. & War. 183.

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PLENTY v. WEST.

Jan. 27.

In appointing new trustees, the Court is not limited to the number originally nominated.

THE testator had appointed three trustees, and the matters of the suit having been determined (a), it became necessary to appoint new trustees.

Mr. Roupell and Mr. Bush, for the Plaintiff, asked that three new trustees might be appointed of his own nomination.

Mr. Speed, on behalf of parties representing two-thirds of the property, contended, that they ought to have the nomination of two out of the three.

It was suggested that four should be appointed.

*The MASTER of the ROLLS.*

I think that in this case, the Court has power to appoint four new trustees. I have, in two instances, nominated two trustees, though the testator had only appointed one.

(a) *Ante*, p. 173.

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NOTE.—See *Birch v. Cropper*, 2 De G. & Sm. 255.

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*Re WISEWOLD.*

**M**R. SANDYS moved for the four-day order against a solicitor, for non-delivery of his bill. The previous order had only been served at the solicitor's office, and not personally on him.

*Jan. 27.*  
To obtain a four-day order against a solicitor for the non-delivery of his bill, it must appear that the previous order has been personally served.

Mr. *W. R. Ellis*, *contrd.*, objected, that the former order ought to have been personally served. He cited *Young v. Goodson* (a), *In re Lloyd* (b), and the 12th order of August, 1841 (c), and the 12th order of April, 1842.

Mr. *Sandys*, in reply. *In re Lloyd* has no application, for there the default was in non-payment of a sum of money, as to which a personal demand is required, but for the delivery of bill of costs, as in the present instance, no demand is necessary; personal service is not necessary even of a *subpoena*.

*The MASTER of the ROLLS.*

According to the authority, there ought to have been a personal service. The former order must therefore be served before the four-day order can be made.

(a) 2 *Russ.* 255.

(c) *Ord. Can.* 167.

(b) 10 *Beav.* 451.

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NOTE.—See *In re Mourilyan*, 13 *Beav.* 84.



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## KNIGHT v. KNIGHT.

Dec. 13.

An allowance  
of income *pendente lite*,  
under the 15  
& 16 Vict.  
c. 86, s. 57,  
will only be  
made upon  
the admission  
by the exe-  
cutors of assets.

IN this case, Mr. *C. Hall*, for a legatee, asked, that the receiver might be directed to keep down the interest on his legacy. He relied on the 15 & 16 Vict. c. 86, s. 57, which provides, that, when the Court shall be satisfied that the property "will be more than sufficient to answer all the claims thereon," it may allow, to the parties interested, the whole or part of the annual income, and for that purpose may make the necessary orders.

Mr. *R. Palmer* and Mr. *W. M. James*, for executors and trustees.

*The MASTER of the ROLLS.*

I can only do that on the admission of assets by the executors taken down by the Registrar.

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NOTE.—See *Dando v. Dando*, 1 Sim. 510; *Coster v. Coster*, 1 Keen, 199; *Abbey v. Gifford*, 11 Beav. 28; *Shewell v. Shewell*, 2 Hare, 154; *Digby v. Boycott*, 4 Hare, 444. *The Master of the Rolls*, in a subsequent case, stated, that applications for an allowance out of income *pendente lite* are now made in chambers.

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NORRIS v. LORD DUDLEY STUART.

Dec. 16.

THE owner of some property mortgaged it to *Jonathan Sandford*, first for 500*l.*; and secondly, for 700*l.* As to the 224*l.*, part of the 700*l.*, *Jonathan Sandford* was a trustee for the Plaintiff *Norris*.


A purchaser under an order in lunacy paid his purchase-money, in the manner directed by the Lords Commissioners in Lunacy, discharging a charge of the Plaintiff and a suit to enforce it, of which he had notice. The amount was principally applied in payment of the costs of the receiver in lunacy relating to the sale, &c. Upon a bill by the Plaintiff to make the purchaser liable for not seeing to the due application of the purchase-money, the *Master of the Rolls*, considering himself bound by the order in lunacy, and as having no jurisdiction to alter it, retained the bill, with liberty to the plaintiff to apply in lunacy for the discharge or variation of the order.

In 1846, *Jonathan Sandford* became lunatic, and a receiver was appointed of his property. In 1848, the mortgagor conveyed the equity of redemption to the receiver, in trust to sell and pay off the mortgages, &c. Accordingly, the receiver, in August, 1848, entered into a contract for the sale of the property to Lord *Dudley Stuart* for 900*l.* By an order of the Lords Commissioners, made in the lunacy on the 5th July, 1850, the sale was confirmed; and it was ordered, that the contract should be completed, and that what should remain of the purchase-money, after payment thereout of 559*l.* odd, due in respect of the first mortgage of 500*l.*, should be paid to the receiver, who was thereupon

application of the purchase-money, the *Master of the Rolls*, considering himself bound by the order in lunacy, and as having no jurisdiction to alter it, retained the bill, with liberty to the plaintiff to apply in lunacy for the discharge or variation of the order.

DATES.

|            |                                       |             |                                     |
|------------|---------------------------------------|-------------|-------------------------------------|
| 1846.      | Mortgages.                            | 1850. Mar.  | Notice to Defendant.                |
| 1846.      | Lunacy of Mortgagee.                  | 1850. July. | Order in Lunacy.                    |
| 1848.      | Release of equity of redemption.      | 1850. Dec.  | Conveyance.                         |
| 1848. Aug. | Sale to Defendant.                    | 1851. July. | Decree, <i>Norris v. Sandford</i> . |
| 1849.      | <i>Norris v. Sandford</i> instituted. | 1851. Dec.  | <i>Norris v. Stuart</i> .           |

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thereupon to convey the property to the purchaser in the place of the lunatic; and it was ordered, that the receiver should retain his costs, charges, and expenses in getting the release of the equity of redemption, and the sale and consequent proceedings in the lunacy, out of the sum to be received by him, and pay the residue into the bank to the credit of the lunacy. The residue after providing for the first mortgage, and deducting the costs, amounted to no more than 3*l.* 0*s.* 9*d.*

The purchase was completed, and the money paid on the 11th of *December*, 1850.

In the mean time, and on the 29th of *January*, 1849 *Norris* instituted a suit against *Sandford* and the mortgagor, to establish his right to 224*l.*, part of the mortgage for 700*l.* The suit was registered the next day; and on the following day, notice of *Norris's* claim was given to Lord *Dudley Stuart*. In that suit, a reference was directed, in *January*, 1850, of which notice was given to Lord *Dudley Stuart* in *March*, 1850, and requiring him not to complete his contract, without providing for what was due to *Norris*.

Disregarding these notices, Lord *Dudley Stuart*, acting under the order in lunacy, subsequently completed his purchase as above stated.

*Norris* filed this bill against Lord *Dudley Stuart*, insisting that the amount due was still a charge on the property.

Mr. *K. Parker* and Mr. *Hetherington*, for the Plaintiff  
 The amount due to the Plaintiff, as part of the second mortgage, is still a charge upon the estate in the hands

of a purchaser with notice. First, there was a *lis pendens* duly registered, and which binds the estate in the hands of a purchaser *pendente lite*; The *Bishop of Winchester v. Paine* (a). Secondly, the purchaser had full notice, at the time he paid his purchase-money, and was therefore bound to see to its due application, and that the Plaintiff's claims were provided for thereout, instead of being applied in payment of the costs. 3 *Sug. Vendors* & *P.* (b); *Story v. Lord Windsor* (c); *Tourville v. Naish* (d); *Wigg v. Wigg* (e).

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Mr. Willcock and Mr. Birkbeck, for the Defendant. As to the *lis pendens*, the contract was prior to the suit, in addition to which *Norris v. Sandford* was not *in rem*. In order that the doctrine of *lis pendens* may apply, the suit must relate to the estate, and not merely to money secured upon it. 3 *Sug. Vendors* (f); citing *Worsley v. Earl of Scarborough* (g). It was the duty of the Plaintiff, if he made any claim against the produce of the sale, to make the purchaser a party to his suit; a mere notice was insufficient. Secondly, the purchaser was not bound to see to the application of the purchase-money. The Plaintiff adopts the sale in the lunacy; and as the Defendant acted under the order of the Lords Commissioners in lunacy, and paid his purchase-money in conformity with their order, he was discharged. Thirdly, the costs, charges and expenses of the sale were the first charge on the purchase-money.

Mr. K. Parker, in reply.

The

(a) 11 *Ves.* 194.

(b) Page 447 (10th ed.)

(c) 2 *Atk.* 630.

(d) 3 *Peere W.* 306.

(e) 1 *Atk.* 383.

(f) 10th ed. p. 458, pl. 22.

(g) 3 *Atk.* 392.

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STUART.*The MASTER of the ROLLS.*

I wish you to confine your reply to this question whether I am or not to consider, that the Defendant has discharged himself, by paying the purchase-money under the order of the Court. With respect to notice I am in your favour. Assume he had notice, and then consider whether I am not bound to treat this payment as a payment in priority of your charge.

Mr. *K. Parker*. The Plaintiff was no party to the proceedings in lunacy, or in any way bound by the same. Assuming the sale to be fair out of Court, we admit the purchase-money has been paid, but deny the right to pay it with notice of our claim. Notice of the proceedings in lunacy ought to have been given to the Plaintiff by the Defendant; he has acted in his own wrong, and must repay the amount.

*The MASTER of the ROLLS.*

When this case was first opened, I thought it clearly in favour of the Plaintiff; but the facts which have been stated by the Defendant have very considerably altered my opinion.


In the first place, I consider it clear, that this suit of *Norris v. Sandford* having been originally constituted for the purpose of establishing the Plaintiff's claim as a *cestui que trust* on a mortgage of *Scott's Lodge*, and notice of that suit having been given to Lord *Dudley Stuart*, he was bound by everything which took place in that suit, and must be taken as having had clear and distinct notice, from the beginning, of the claim which the Plaintiff ultimately established in that suit. The fact

fact that the contract for the purchase of the estate had been entered into beforehand, does not, in my opinion, in the slightest degree, affect the question. The propriety of the sale of the estate to Lord *Dudley Stuart* is not disputed. What is disputed is, the propriety of the application of the purchase-money. If the purchase-money had been sufficient to pay all the charges upon the estate, and Lord *Dudley Stuart*, after notice, had thought fit to pay it over to Mr. *Sandford*, and he had applied it to his own use, the Plaintiff would, in that case, have been entitled to stand as a mortgagee upon the estate, and entitled to the benefit of the charge of the 700*l.* upon the estate to the extent of his claim : inasmuch as the Defendant, with full knowledge of it, had paid away the mortgage-money to the trustee, without seeing that it was duly applied to the *cestuis que trust*. It appears from the facts proved in this cause, that the amount of purchase-money and interest was something under 1,000*l.*, that the money applied in payment of the first mortgage on the estate (which is not disputed) was 573*l.*, and that the remainder of the purchase-money was applied in payment of costs and other things, leaving a balance of 3*l.* 0*s.* 9*d.*, which the Defendant admits the Plaintiff is entitled to. If that be all he is entitled to, he might have received it before the institution of this suit, which would therefore be unnecessary; and it would be the duty of the Court to dismiss the bill with costs. But the Plaintiff disputes the propriety of the subsequent payments made in proceedings to which he was no party, and he asks me, in this cause, to determine, that those payments were not properly made. I have no means of judging as to the propriety of those payments. There is an order of the Court of *July*, 1850, made in the lunacy, which directs payments of these costs to be made; and so long as

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as that order stands, I must assume it to be correct. But, at the same time, it appears to me, that the Plaintiff ought to have an opportunity given him of resisting that order, and of showing that it ought not to have been made, and was not binding upon him, and that it was incumbent on Lord *Dudley Stuart* to have done what he could, to have caused the Plaintiff to be bound by the order which was so made, and which it appears to me he has not done.

So long as that order stands, I consider myself bound by it; and assuming that order to be inaccurate, as I have no jurisdiction in lunacy, I cannot touch it. But I think that the Plaintiff ought to have an opportunity of showing, if he can, that that was not a proper order, and of getting it discharged or varied if possible.

The order therefore which I propose to make is this:— to direct the cause to stand over for six months, with liberty, in the meantime, to the Plaintiff to take such proceedings as he may be advised, for the purpose of discharging or varying the order of the 5th of *July*, 1850.

I apprehend that the Lord Chancellor or the Lords Justices would probably think, that the Plaintiff ought to be at liberty to take such proceedings in the lunacy, as will enable him to ascertain, whether that order is properly binding on him; and whether, in fact, these payments were properly made in discharge of a lien on the estate having priority to the mortgage of which he is the *cestui que trust*.

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WALKER v. MOWER.

Dec. 17, 18.

**T**HE testatrix, who died in 1845, gave leasehold premises, situate in *Willow Terrace*, to trustees, for her daughter *Mary Anne Walker*, for her separate use for life; "and after her decease, upon trust to assign the said leasehold premises in *Willow Terrace*, for the residue of the term therein, unto and between all and every the children of her said daughter, to and for their own use and benefit, on their respectively attaining the age of twenty-one years. *And if there should be but one child, then upon trust to assign the same unto such only child, to and for his or her use or benefit.* But in case my said daughter should depart this life without leaving any issue her surviving, then *upon trust*" to assign to the Plaintiff.

The doctrine laid down in *Leake v. Robinson* as to remoteness applies to real as well as to personal estate.

Devise and bequest of real and personal estate to trustees for *A.* for life, and afterwards "to convey and assure" equally between all *A.*'s children, on their respectively attaining twenty-one, with a gift over on *A.*'s death without "leaving any child." There was one child who survived *A.*, and died an infant. Held, that such child did not take a vested interest; and, secondly, that the gift over did not take effect.

**I**n a subsequent part of her will, the testatrix gave one moiety of all the residue of her freehold, copyhold and leasehold estates, to trustees, on certain trusts for her son, with certain limitations over, and the other moiety in trust for *Mary Anne Walker*, for life, "and after her death, upon trust to convey and assure" the same "unto and equally between all and every the child and children of her said daughter (*Mary Anne Walker*), on their respectively attaining twenty-one years of age, to and for their absolute use and benefit." There was a gift over to the Plaintiff, the testatrix's son, in case *Mary Anne Walker* "should depart this life not

Bequest of leaseholds, upon trust to assign unto all the children of

*A. B.* on their respectively attaining twenty-one, and if one child, to assign to such child (omitting on attaining twenty-one). An only child, who died an infant, was held to take a vested interest.



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*Mary Anne Walker* died the 30th *September*, 1850, leaving one child only, who died on the 28th of *October* following, aged three months.

The questions argued were, as to the leaseholds in *Willow Terrace*, and the moiety of the testatrix's freehold, copyhold and leaseholds.

Mr. *Willcock* and Mr. *W. W. Cooper*, for the Plaintiff (the devisee in remainder and heir of the testatrix) First, the Plaintiff is entitled to the house at *Willow Terrace* absolutely, for there is no gift to the children *Mary Anne Walker*, except in the direction to assign on attaining twenty-one. This was not a vested interest in the children while infants. If there had been two children who had died under twenty-one, their representatives would clearly not be entitled, and the construction cannot be different where an only child died under that age. The gift over to the Plaintiff, on his death without leaving any issue, is to be read "without leaving such issue," namely, children attaining a vested interest, and this event has happened; 2 *Jarman on Wills* (a); *Ginger d. White v. White* (b).

As to the moiety of the residue, they argued that it was clear that the child could not take, and that the Plaintiff took, either under the devise over, or as heir at law of the testatrix. They cited *In re the Trusts of Thruston's Will* (c); *Murray v. Tancred* (d); *Bouverie v. Bouverie* (e); 1 *Vict. c. 26*, s. 29.

Mr.

(a) Page 372.

(b) *Willes*, 348.

(c) 17 *Sim.* 21.

(d) 10 *Sim.* 465.

(e) 2 *Phillips*, 349.

Mr. *W. H. Clarke*, for parties in remainder after the Plaintiff, argued that "issue" must be construed "children," and that the gift over was effective, *Edwards v. Edwards* (a).

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Mr. *Roupell* and Mr. *Hitchcock*, for the executors and trustees, referred to *Doe d. Rew v. Lucraft* (b).

*The MASTER of the ROLLS.*

I think the representative of the child is clearly entitled to the *Willow Terrace* property. As to the residue, my difficulty is to distinguish this from *Leake v. Robinson* (c), and to find any gift except in the direction to convey and assure on attaining twenty-one.

Mr. *R. Palmer* and Mr. *Hobhouse*, for the father and legal personal representative of the child. The child took a vested interest in the residue at her birth. The law is in favour of the vesting of estates (d), and devises are held to be vested, notwithstanding expressions of seeming contingency. *Boraston's Case* (e) is a leading authority, where there was a devise of land to executors, until *H.* should attain twenty-one, "and when he should accomplish his age of twenty-one years, then to him" and his heirs. *H.* died under twenty-one; it was held that he took a vested interest.

*Edwards v. Symons* (f); *Doe d. Roake v. Nowell* (g);  
*Doe d. Hunt v. Moore* (h); *Doe d. Dolley v. Ward* (i);  
*Phipps*

(a) 12 *Beav.* 97.

(b) 8 *Bing.* 386.

(c) 2 *Mer.* 363.

(d) 1 *Jarman*, 726.


(e) 3 *Rep.* 19.

(f) 6 *Tuunt.* 213.

(g) 1 *M. & Sel.* 327; 5 *Dow.* 202.
















(h) 14 *East*, 601.

(i) 9 *Ad. & Ell.* 582.

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*Phipps v. Ackers*(a); *Newman v. Newman* (b); *Jack-*  
*son v. Majoribanks* (c); *Riley v. Garnett* (d); *Stanley*  
*v. Stanley* (e); *Leeming v. Sherratt* (f); were also cited.

*The MASTER of the ROLLS.*

With respect to the leasehold in *Willow Terrace*,  
 think I should be inserting words into the will,   
 I were to hold that an only child was not to take unless   
 he attained twenty-one. The meaning of the testatrix   
 may have been capricious and singular, that if there   
 should be two or three children, they should not take   
 vested interests until they attained twenty-one, but that   
 an only child should take a vested interest at his birth   
 The word "then" appears to have no other meaning   
 than this: "in that case," or "on that event occurring,"   
 that child is to take. The probable intention would be   
 defeated, if I were to import into the gift to a single   
 child, the same condition as is contained in the previous   
 gift amongst several. I am therefore of opinion, that   
 the child, who survived her mother twenty-eight days   
 took a vested interest in the house in *Willow Terrace*,   
 and that her father, as her legal personal representative,  
 is now entitled to it.

With respect to the other gift, I have felt more diffi-  
 culty. I think it convenient to consider the case as  
 if the gift to the children stood alone, and then to  
 consider the gift over.

The gift is of a moiety of the freeholds, copyholds  
 and

(a) 9 *Cl. & Fin.* 583.  
 (b) 10 *Sim.* 57.  
 (c) 12 *Sim.* 93.

(d) 3 *De G. & Sm.* 629.  
 (e) 16 *Ves.* 491.  
 (f) 2 *Hare*, 14.

and leaseholds to trustees, to convey and assure the same, equally between the children, on their respectively attaining twenty-one years of age. It is true that in *Boraston's Case* (a), a gift to a child, when he should attain twenty-one, was held to be a vested interest, but it is new to me, if there be any case, in which it has been laid down, that where an estate is given to trustees, in trust to convey to children on their attaining twenty-one, there is any vested interest before the time for conveying arrives, that is, before the child attains twenty-one. *Leake v. Robinson* (b), in which Sir W. Grant took great pains to examine the previous authorities, is express on the subject as regards personalty; and though, in some instances, the same words, when applied to real estate, have received a different construction from that which they have received when applied to personal estate, yet I am not aware that any such distinction has ever been extended to the case of a direction to convey to children on attaining a given age. I think I should be extending *Boraston's Case*, which I am not inclined to do, if I were now to introduce such a distinction. It is highly desirable to assimilate, as much as possible, the rules of construction in cases of real and personal estate; and although the Court may be bound by particular rules in some instances, as in *Forth v. Chapman* (c), to give different constructions to different words, in cases of real and personal property, yet it will not extend the distinction, unless it is obvious, that the testator intends the same words to have a different meaning when applied to different species of property.

I think that there being no gift to any child, except in the direction to convey at twenty-one, the child took  
no

1852.

WALKER  
v.  
MOWER.

(a) 3 Reports, 19. (b) 3 Mer. 363. (c) 2 P. Wms. 140.

1852.

WALKER  
v.  
MOWER.

no interest in the residuary freehold, copyhold and leasehold estates, comprised in the residuary gift.

As to the gift over, I am of opinion that it did not take effect, because the tenant for life did not die out "leaving any child," the deceased leaving a daughter. There is, therefore, an intestacy, and the moiety of the freeholds go to the heir, and of the lease to the next of kin.

Dec. 21.

## SOLLEY and Others v. WOOD.

A country solicitor who is authorized to institute a suit, is justified in employing a London agent for that purpose, in whose name, as agent, the bill may be filed.

THIS was a motion on behalf of the Plaintiff, *Elizabeth Solley*, that her name might be struck out of the bill, and that Messrs. *W. and G.*, the solicitors, might pay the costs of this application. The motion was founded on this:—that she had given authority to file the bill, but a letter, signed by her, was produced, by which she had directed Mr. *S.*, a solicitor of *Canterbury*, to file a bill in Chancery. Messrs. *W. and G.* were the town agents of Mr. *S.*

Mr. *R. Palmer* and Mr. *Speed*, in support of the motion, argued, first, that no authority had been given, and, secondly, that the authority, if any, had been given to Mr. *S.*, and not to Messrs. *W. and G.*, and that Mr. *S.* had no right to delegate his power to others, where the client might be greatly prejudiced, and a lien on his papers given to strangers.

They cited *Allen v. Bone (a)*.

(a) 4 *Beavan*, 493.

Mr. *Lloyd* and Mr. *Shapter*, for the Respondents, were  
not heard.

1852.

SOLLEY  
and Others  
v.  
WOOD.

*The MASTER of the ROLLS.*

I am satisfied that an authority was given by the  
Plaintiff to Mr. *S.* That is distinctly proved by the  
exhibit and three witnesses.

The next point is, that, although an authority might  
have been given to Mr. *S.*, yet that none was given to  
Messrs. *W.* and *G.* If such an objection were allowed,  
the consequence would be that a client could not em-  
ploy a country solicitor in a suit, unless such solicitor  
himself came up to *London* to conduct it in person. It  
is the ordinary and recognized practice of country solici-  
tors to employ a *London* agent. All that is required is,  
that he should appear in the bill to be acting as agent.

Mrs. *Solley's* name may be struck out as Plaintiff, on  
her giving security for costs, and she must pay the costs  
of the application.

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1852.

## HURST v. HURST.

Dec. 17, 23.

A tenant for life, having a power to charge the estate with portions for younger children, mortgaged his life estate, and covenanted not to exercise the power. Held, that he could not, afterwards, charge the estate with portions, to the prejudice of his mortgagees.

Principles on which the Court acts in directing a sale of a mortgaged estate, under the late act.

A TESTATOR, by his will dated in 1839, devised real estates to the use of *Robert Henry Hurst* the elder for life, with remainder to *Robert Henry Hurst* the younger for life; with remainder to his first and other sons in tail, &c., &c. And power was thereby given to *Robert Henry Hurst* the elder, when in possession, to charge the estates with any sum not exceeding 20,000*l.* for the portions of his younger children, and to create a term for securing it. Other powers were also given him.

The testator died in 1843, and after his death, the tenants for life incumbered their life estates to a considerable extent; first, by a demise for ninety-nine years, and afterwards by an indenture of the 22nd of June, 1844, whereby they charged their life estates (subject to the prior mortgages) to the Plaintiff, for securing 10,000*l.*; and it was thereby provided, that *Robert Henry Hurst* the elder should not use or exercise, or consent to the use or exercise, of the powers contained in the will or any of them.

Afterwards, by an indenture of the 6th of August, 1844, *Robert Henry Hurst* the elder charged the estate with 20,000*l.*, for the portions of his younger children, to be vested and payable at such times as he should appoint, and he appointed the estate to a trustee for an immediate term of 1,000 years for securing the amount.

The next day, and on the marriage of his daughter, Mrs. *Mills*, he appointed 5,000*l.*, part of the 20,000*l.*,  
immediately

immediately in her favour, and the amount was settled upon her and her family. The parties to the settlement and their trustees *had notice* of the mortgage to the Plaintiff, who gave no consent to the execution of the power to raise portions.

1852.

HURST  
v.  
HURST.

The suit was for foreclosure and redemption, and the principal question was, whether the Plaintiff's security had priority over the portions.

Mr. *Follett* and Mr. *Kinglake*, for the Plaintiff. The tenant for life having incumbered his estate, was not afterwards at liberty to derogate from his own grant and defeat or prejudice his mortgagee's rights; *Hole v. Escott* (a); *Noel v. Lord Henley* (b). They asked for a sale of the estate under the 15 & 16 *Vict. c. 86* (c).

Mr. *Terrell*, for the tenants for life, and Mr. *Bazalgette*, for the appointees under the power, *contrà*. A tenant for life has no right to deprive the objects of a power to raise portions of the provisions intended for them by the testator (d). The case of *Badham v. Mee* (e) has been dissented from, *Jones v. Winwood* (f). Here the parties claiming under the donor's settlement are purchasers for valuable consideration, and they have a legal term to protect them, which enables them to retain their priority against the Plaintiff's mere equitable charge.

*The MASTER of the ROLLS.*

I think it clear, that the appointees of the 20,000*l.* have

- |                                                        |                                                    |
|--------------------------------------------------------|----------------------------------------------------|
| (a) 2 <i>Keen</i> , 444; 1 <i>Sug. Pow.</i>            | and 1 <i>Y. &amp; Coll. (C. C.)</i> 715;           |
| 51.                                                    | <i>Lord Leigh v. Lord Ashburton</i> ,              |
| (b) <i>MCl. &amp; Y.</i> 302.                          | 11 <i>Beav.</i> 470.                               |
| (c) <i>Sect.</i> 48.                                   | (e) 7 <i>Bing.</i> 695; 1 <i>Myl. &amp; K.</i> 32. |
| (d) See <i>Whitmarsh v. Robert-</i>                    | (f) 10 <i>Sim.</i> 150; 3 <i>Mee. &amp;</i>        |
| <i>son</i> , 1 <i>Coll.</i> 570; 4 <i>Beavan</i> , 26; | <i>Wels.</i> 653.                                  |



1852.  
HURST.  
v.  
HURST.

have no priority over the first three mortgages. It is only necessary to advert to this circumstance, that the first three mortgages contain a covenant on the part of the tenant for life that he will not execute the power of appointment, without the consent of the mortgagees, and that the appointees had notice of those deeds, at the time of the marriage, and when the appointment was made. I am of opinion, therefore, that they cannot have any priority over the first mortgage, and that the term of 1,000 years, which is only a reversionary term, although not made subject to the term of ninety-nine years in the first mortgage, does not affect the question or vary the rights of the first mortgagees.

The next question is with respect to the sale of the estate. I apprehend that the statute, enabling the Court to direct a sale, intended to give the Court a very considerable discretion, in order to avoid the great delay and expense which is occasioned by foreclosure and redemption in a case where there is a great number of successive mortgages; and the Court will, upon the terms and according to the directions contained in the section, exercise that power in such a manner as not to operate injuriously or oppressively on any person interested. If, therefore, a sale of this property could now take place, as beneficially and profitably to the parties concerned, as by allowing the rents to be received, I should think it a proper case for the exercise of that discretionary power contained in the act. But I should give liberty to the persons interested to bring before me any matters which might vary or alter my opinion, because they have not had the opportunity of so doing, in consequence of the cause being at issue before this act came into operation. The power given to the Court, as I read it, is, at the instance of the first mortgagee, to direct a sale if it should think fit, or at the

the instance of a second or any *puisne* incumbrancer, with the consent of the prior incumbrancer; or if they do not consent, then upon ordering such sum of money to be paid into Court as the Court may think necessary to protect them. Assuming this to be, in other respects, a proper case to direct a sale, I think if the second mortgagees consented, and the third mortgagee paid into Court the amount of the first mortgage, then, as the first mortgagee will clearly have a security both on the proceeds of the sale of the estate and on the money in Court, he would be perfectly safe.

1852.

HURST  
v.  
HURST.

I do not consider that under this clause the Court would be induced to act oppressively, so as to dispossess a family of an old family estate. It is possible also, that a life estate might not sell well, and that a mere estate *pour autre vie* (which this would be) would not, if sold, be so productive for the benefit of the mortgagees, as the receipt of rents during the continuance of the lives. I therefore think it fair, to give the parties interested an opportunity of bringing forward, on affidavit, any facts they may think material upon this question, before I direct a sale.

The question was again discussed, whether there should be a sale under the act. Affidavits were produced on behalf of the mortgagors, showing that the property being near *Horsham* was adapted for building purposes, and was likely to increase in value; that it was not probable that it would fetch its full value if sold, and that a sale would be very injurious to the mortgagors, who were also attempting to compromise with the incumbrancers.

Dec. 23.

Mr.

1852.

HURST.  
v.  
HURST.

Mr. *Terrell*, for the mortgagors.

Mr. *Headlam*, for the first mortgagee, consented to a sale.

Mr. *Giffard*, for some of the prior mortgagees, asked to have the amount of their claim paid into Court.

Mr. *Follett* and Mr. *Kinglake*, for the Plaintiff.

Mr. *R. Palmer*, for a *puisné* incumbrancer.

*The MASTER of the ROLLS.*

I think the discretion is given with a view to its exercise for the benefit of all parties interested, and so as not to injure any of them. It is to be observed, that in this case no one has advanced his money in the belief that the Court possessed the power of directing a sale, for the act has passed pending the suit: and also that the discretion of the Court does not interfere with any power of sale which the mortgagor has granted to the mortgagees. The first mortgagee, if he has a power of sale, may exercise it, and the only way to prevent it will be, by paying him his money. The other mortgagees have no power of sale, and I have, therefore, only to consider, whether it would be most for the benefit of all parties, that this estate should be sold or not. It will, no doubt, cause great delay and expense if there should be successive foreclosures; but on the other hand, if the estate is likely to be sold for less than its value, in consequence of the circumstances under which it is now placed, it is a matter to be set off against the delay and expense of foreclosing.

I do not consider, that the fact that the second tenant for life, who is one of the mortgagors, is endeavouring to compromise, is any ground for refusing a sale. If the statements

statements in the affidavit be correct, there is this dilemma, that if the mortgagor can induce the mortgagees to compromise their claims, it shows that he has no interest in the estate, and that the result will be, that the first, second, and third mortgagees alone will be paid.

1852.

  
HUNST  
v.  
HUNST.

On the affidavit, I think it appears that a sale would be such an injury to the mortgagor and the latter incumbrancers, as it would be unjust to inflict on them. I shall therefore exercise my discretion, by directing the common decree for redemption and foreclosure.

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NOTE.—The appointees intended to appeal, but a general arrangement was come to between the parties, and no decree was drawn up.

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### Re BLACKMAN.

THE testator, by his will, dated the 21st of *January*, 1851, gave the residue of certain trust funds thereby provided, equally, between "*John Wheeler, George Wheeler, Mary Wheeler*, widow, and *William Wheeler*, the children of his mother's sister, *Mary Wheeler*, deceased."

Dec. 23.

Erroneous description of a legatee rejected upon extrinsic evidence.

*A.*, the grand-child of *C.*, and *B.*, the widow of a child of *C.*, held, under the circumstances, entitled to a bequest made to *A.* and *B.*, widow, described as "children of *C.*"

The testator died on the 2nd *July* in the same year, and the question arose upon the gifts to *John Wheeler* and *Mary Wheeler*, widow, under these circumstance:—

*Mary Wheeler*, the sister of the testator's mother, had had a son called *John Wheeler*, but who had died in *August*, 1848, prior to the date of the testator's will, and it was clearly proved that the testator was aware of his death. He had left a son *John Wheeler*, who, by this petition, claimed one-fourth of the trust fund.

There

1852.  
Re  
BLACKMAN.

There was evidence that after the death of *John Wheeler* the elder, the testator had intimated to *John Wheeler* the younger, that he had left him some benefits by his will.

As to *Mary Wheeler*, widow, the child of *Mary Wheeler*, deceased, there was no person who answered that description, but there was a *Mary Wheeler*, the widow of *Richard Wheeler*, a deceased son of *Mary Wheeler*, and she also by this petition claimed one-fourth of the fund.

There was evidence that during his last illness the testator had stated to the claimant *Mary Wheeler*, who nursed him, that he had done something for her by his will.

The will had been prepared by a professional gentleman who was unacquainted with the family, and on referring to a former will of 1837, "*John Wheeler, George Wheeler, Mary*, the widow of *Richard Wheeler*, and *William Wheeler*, the children of the testator's mother's sister *Mary Wheeler*, deceased," were appointed residuary legatees.

Mr. *Hardy*, for *John Wheeler* and *Mary Wheeler*, contended, that the evidence made the case clear, and that the erroneous description must be rejected.

Mr. *Sheffield*, for the residuary legatees, argued, that the legacy was void for uncertainty; that *John Wheeler* could not take under the description of his father, nor could *Mary*, who was not related to the testator, take under the description of his niece.

*The MASTER of the ROLLS.*

1852.

  
*Re*  
BLACKMAN.

I think I cannot construe the will of 1851 by the previous will, and that I must look at the case as if the will had been made for the first time in 1851.

There is clear evidence that the testator knew that there was no such person living as *John*, the son of *Mary*, yet he introduced the description of such a person in his will, the only *John Wheeler* then existing being the grandchild. I think it is not too much to say, that *John Wheeler*, the grandson, was intended, there being no other child of this name, and there being distinct evidence, that the testator stated to him that he intended to leave him something.

.He has made a gift to *Mary Wheeler*, the widow, described as a child of his aunt. But under the circumstances, and there being evidence of an intention to benefit her, I must hold that he intended to include her.

The testator has used the expression "children" in a loose manner, to describe the four different branches of the family of his aunt.

Order the transfer to the Petitioners.

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1852.

## BANKS v. BANKS.

Dec. 8, 21, 23.

When biddings are opened, the purchaser is entitled to interest on his deposit at four per cent.

A party opening biddings must deposit the amount of his advance, but he is not required, in the first instance, to pay into Court the amount of the original deposit. Upon his neglect to make the required payment, the order to open biddings will be discharged with costs, to be paid by him.

SOME property had been sold under the Court, and the purchasers had made a deposit of 1,798*l*. A motion was made by a Mr. *Josiah Hall* to open the biddings, upon an advance of 665*l*.

Mr. *R. Palmer*, for the motion.

Mr. *Lloyd*, for the purchaser, asked that he might receive back interest on the deposit.

Mr. *Beavan*, for a party to the cause, argued that the biddings ought not to be opened, unless Mr. *Hall* made the same deposit as the original purchaser, and which was now required by the General Orders (3rd Order of 16th *July*, 1851) (a); for otherwise, the present purchaser might be released without any security that the applicant would ever complete his purchase.

The MASTER of the ROLLS, as to the interest, directed the order to be drawn up in the usual form; but as to the deposit, he thought, that he could not direct the whole deposit to be paid by Mr. *Hall*, until it had been ascertained that he was to be the purchaser.

(a) *Ord. Can.* 450, and see 2 *Sm. Pr.* 264, 265 (3rd ed.)

NOTE.—It was ordered, that on payment to the purchasers of their costs, charges and expenses, within one week after the Master's certificate, and upon payment to the purchaser of interest at four per cent. on the deposit of 1,798*l*., and on paying into Court 655*l*., within a month after the Taxing Master's certificate, by way of deposit, there should be a resale, &c.

The costs were taxed after some delay, but *Josiah Hall* neglected to make these payments; and on the 28th of *July*, 1853, the above order was rescinded and *Josiah Hall* ordered to pay the costs of all parties.

1853.

The SUTTON HARBOUR COMPANY v.  
HITCHENS.

Jan. 11.

**T**HIS bill was filed, on the authority of the *London and North-Western Railway Company v. Smith* (a), and upon that being over-ruled, the *Master of the Rolls*, on motion, dismissed the bill without costs (b). On appeal, the order was, on the 25th of *March*, 1852, varied by the *Lords Justices*, as to the costs, by giving the Defendant the costs of the motion to dismiss, with liberty to apply as to the other costs of the suit, if he should, before the last day of *Trinity* term next, establish his right to compensation (c).

An arbitrator, Mr. *Hicks*, was appointed by the Defendant under the *Lands Clauses Consolidation Act*, 8 & 9 *Vict.* c. 18, who was attended by both sides, but the award was not taken up.

A motion was now made, on behalf of the Defendant, that the Plaintiffs might pay the costs of the suit, or might be compelled to take up the award.

Mr. *Terrell*, in support of the motion. By the *Lands Clauses Consolidation Act*, it is provided (d), that the arbitrators shall deliver their award to the company, who are bound, at their own expense, to furnish a copy to the other party. They are, therefore, bound to take

A bill by a company against an individual claiming to be injuriously affected under the 68th section of the *Lands Clauses Act* was dismissed, with liberty to the Defendant to apply for the costs, if he should establish his right to compensation. The parties proceeded by arbitration, but neither took up the award. Upon motion by the Defendant that the company might pay the costs or be compelled to take up the award, Held, as to the first, that the Defendant was premature, no award having been made; and, as to the second, that the Court had no jurisdiction.

(a) 1 *Holl & Tw.* 364; 1 *Macn.* & *Gor.* 216.

(b) 15 *Beavan*, 161.

(c) 1 *De G. M. & G.* 169.

(d) 8 & 9 *Vict.* c. 18, ss. 25, 68.



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 The  
 SUTTON  
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it up. This is similar to the case where an issue is directed; if the Plaintiff does not go to trial, judgment will be assumed against him (*b*). Here it must be presumed that the award is in the Defendant's favour, and he is, therefore, entitled to the costs of suit. The Plaintiffs have submitted to the jurisdiction of this Court, and have entered into an implied undertaking to get the award.

Mr. *R. Palmer*, and Mr. *C. Hall*, *contrà*, were not heard.

*The MASTER of the ROLLS.*

I am of opinion that I can make no order. This motion is in the alternative. One branch asks that the Plaintiffs may pay the costs of the suit. This is founded on the order of the *Lords Justices*, giving liberty to the Defendant to apply, in case he should establish his right to compensation. When the award has been made, the Defendant may apply for the costs of suit; but this application is premature, because the Court does not as yet know what the award is, or whether any damages are awarded to the Defendant.

The second branch is, that the Court may compel the company to take up the award. It is not disputed, that this Court has no primary jurisdiction to compel the company to take up the award. Jurisdiction, it is true, may be given to this Court by consent or submission, but no such jurisdiction is given by anything contained in this order. There is nothing to give the Court power to compel the company to take up the award.

The

(a) See *Johnston v. Todd*, 3 *Beavan*, p. 222, and note.

The power of the Court in this matter is the same as if no suit existed, and the only remedy, if any, is by an application to a Common Law Court.

I must refuse the motion, with costs.

1853.

SUTTON  
HARBOUR  
COMPANY  
v.  
HITCHENS.

MEYER'S CASE. — *In re* The BRITISH and AMERICAN STEAM NAVIGATION COMPANY.

Jan. 13.

IN 1836, a prospectus was issued for the establishment of "The British and American Steam Navigation Company," for specified purposes, and on specified terms. In 1835, Mr. *Meyer* applied for ten shares of 50*l.* each, which were allotted to and accepted by him, and he paid a deposit of 5*l.* each on the shares, but he executed no deed. The projectors afterwards thought it advisable to change the nature and character of the undertaking, and it was varied and established on principles materially different from those stated in the prospectus (*a*).

*A. B.* took ten shares in a company, intended to be formed for specified objects and on stated principles. The projectors afterwards materially varied its character. *A. B.* did no act by which he assented to the variation or adopted the new company. Some time after, the directors agreed, that nine of *A. B.*'s shares should be cancelled, and that *A. B.* should remain a shareholder for one. Held, that *A. B.* was not a contributor in respect of the nine shares.

Mr. *Meyer* did no act by which he assented to the change, or adopted the altered undertaking; and all applications to him for calls were disregarded. However, in *March*, 1838, the Board of Directors agreed to allow him to pay 50*l.* in addition to the 50*l.* already paid, and to grant him one paid up share. This he took, and afterwards disposed of and transferred it. The transaction was entered in the company's books,

but

(*a*) See *Goldsmid's Case*, *ante*, p. 262.

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 MEYER'S  
 CASE.  
*In re*  
 The BRITISH  
 and AMERICAN  
 Steam  
 Navigation  
 Company.

but it did not appear that the directors had any power to cancel shares.

An order having been made to wind up the company, Mr. *Meyer* was inserted by the Master on the list of contributories for the nine shares. He now moved, by way of appeal, from the Master's decision.

Mr. *R. Palmer* and Mr. *Dickinson*, for the motion, Mr. *Meyer* agreed to take ten shares in a specified undertaking. This was never formed, but a different one substituted, which he did not adopt. He was not, therefore, a shareholder in the new company, *Goldsmid's Case (a)*. He subsequently took one share only, and in respect of that alone he became a shareholder, but he has since duly transferred it. The directors were justified in making the arrangement, *Beresford's Case (b)*.

Mr. *Roxburgh*, *contra*, argued, that the decision of the Master was right, for Mr. *Meyer* had taken ten shares, and had afterwards dealt with them, by entering into arrangements respecting them with the directors, and which they had no authority to concur in. See *Morgan's Case (c)*.

The MASTER of the ROLLS considered, that when the nature of an undertaking had been completely changed, and a new and distinct one formed, persons who agreed to become shareholders in the first, did not become shareholders in the second, unless they did some subsequent act to make themselves so. That, in this case, the company had been so changed, as to become a new company

(a) *Ante*, p. 262.

(b) 2 *Hall & Twells*, 388; 2

*Macn. & G.* 197.

(c) 1 *Macn. & G.* 225.

company, and that Mr. *Meyer* had done no act to make himself a shareholder in it, except in respect of one share.

That, if the transaction of *March*, 1838, was invalid, it was invalid altogether, and could not be treated as valid for the purpose of making him a shareholder in the new company, but invalid as releasing him from the old. He reversed the decision of the Master, and ordered, "that the name of the said *Edward Meyer* be excluded from the list of contributories of the said company."

1853.

MEYER'S  
CASE.

*In re*

THE BRITISH  
AND AMERICAN  
Steam  
Navigation  
Company.

ATTORNEY-GENERAL v. SMYTHIES.

**B**Y letters patent of King *James* the First, a charitable corporation was created, having for its object the support and maintenance of a master and five poor persons (a). The master was to receive the income, and pay the poor persons 2*l.* 12*s.* 0*d.* annually, by quarterly payments, for their support, relief, and maintenance.

Mr. *Smythies*, the late master, died on the 24th *March*, 1852; and a petition being presented by the new master for payment of the income, the executors of Mr. *Smythies* claimed an apportionment of the half-year's income ending the 5th *July*, 1852, upon a fund in Court belonging to the charity.


Jan. 14.

The income of a fund belonging to a charitable corporation, having for its object the support, relief and maintenance of a master and five poor persons, held apportionable between the new and the representatives of deceased masters, though not within the Apportionment Acts (11 *Geo.* 2, c. 19, and 4 & 5 *Will.* 4, c. 22).

Mr.

(a) See 2 *Russ. & M.* 717; 1 *Keen*, 289; 2 *Myl. & Cr.* 135.

by a new master of a hospital for payment of the income of a fund in Court, held payable out of the income.

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 ATTORNEY-  
 GENERAL  
 v.  
 SMYTHIES.

Mr. *Howe*, for the Petitioner, Mr. *Lodge*, the new master, contended, that there ought not to be an apportionment. It was admitted, that the case did not fall within the Apportionment Acts (11 *Geo.* 2, c. 19 s. 15, and 4 & 5 *Will.* 4, c. 22), but it would be contended, that there ought to be an apportionment, on the construction of the terms of the letters patent, establishing the charity for the *support, relief and maintenance* of the master and five poor persons. That there was no foundation, however, for such a construction; and unless a case came within the provisions of the Apportionment Acts, the Court would not direct an apportionment, with two exceptions:—one in the case of an income for the maintenance of infants, and the other in that of married women living separate from their husbands. In *Rashleigh v. Master* (a) it was held, that the dividends of stock were not apportionable, though, if the money had been invested in land instead of stock, it might have been.

Mr. *Smythe*, *contra*, contended, that the charity being founded for the support, relief and maintenance of the master and the five poor persons, this case came within the principle of the rule as to the maintenance of infants; and the endowment being for the support and maintenance of the successive incumbents, there ought to be an apportionment. That this was not the case of an annuity granted to a person for life, but a case where a master had an office to discharge, and a provision was made for his maintenance and support, by means of property of which the body corporate was the trustee. He cited *Hawkins v. Kelly* (b); *Aynsley v. Wordsworth* (c).

M<sub>1</sub>

(a) 3 Bro. C. C. 99.  
 (b) 8 Ves. 308.

(c) 2 Ves. & B. 331.

Mr. *Howe*, in reply.

*The MASTER of the ROLLS.*

I am of opinion, that there must be an apportionment. The question does not rest upon the general ground of cases not falling within the provisions of the Apportionment Acts, but comes within the principle of the rule, in the cases of infants and married women who have no other support. I think this must be so, from the language of the charter itself. Here is an eleemosynary establishment, the funds of which are directed, by the statutes, to be applied for the support, relief and maintenance of five poor persons; which upon a proper construction of the letters patent, must be *de die in diem*, for if it were otherwise, the almspeople might be unable to procure sufficient supplies for their support during portions of the year, in consequence of the risk which those who supplied them would run of not being repaid. For if they could not recover out of the fund what was owing for supplies, they would be deprived of payment altogether.

The same principle, I think, applies to the master as to the five poor persons, and therefore there must be an apportionment of the dividends between the present and the representatives of the late master. The costs of this petition must come not out of the fund itself, but out of the half-year's income, and the residue of it must then be apportioned.

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A husbandry lease of charity property for ninety-nine years at a fixed rent cannot stand.

In the case of a charity lease, the burden of proof of its fairness lies on the lessee.


A lessee taking a lease of property belonging to a charity, but without notice of that fact, may protect himself as a purchaser for valuable consideration, *semble*. A lessee of charity property held to have constructive notice that it was trust property, the circumstances rendering it incumbent on her to inquire as to the lessor's title.

## ATTORNEY-GENERAL v. HALL.

IN 1711, *Robert Stephenson* conveyed a close of meadow, with a cottage and corn-mill thereon, to four trustees, in trust for himself for life, and afterwards, for the use of the Nonconformist Protestant preachers, for the time being, of a chapel in *Beverley*.

In 1730, the trustees demised the property to *Birket* for ninety-nine years, at a rent of 4*l*. No notice appeared on the lease of its being charity property. *Birket's* lease became vested in *Mrs. Stickney*, and in 1800, she agreed to surrender the old lease, which had thirty years to run, and pay 300*l*. on having a new lease granted to her. Accordingly, by an indenture of the 6<sup>th</sup> of *September*, 1800, and made between the seven persons therein named (who were different persons from the lessors in the lease of 1730), of the first part, *Peter Feast*, described as of *Beverley*, nonconforming Protestant preaching minister there, of the second part, and *Mrs. Stickney*, of the third part, the parties of the first part, with the consent and approbation of *Peter Feast*, demised the property, described as containing one-and-a-half acres, and a cottage and stable thereon, to *Mrs. Stickney* for ninety-eight years, at the yearly rent of 4*l*. And it was agreed, that *Mrs. Stickney* should have liberty to erect such buildings thereon as should be necessary; and that at the end of the term, she should be at liberty to remove off the premises such buildings as were then standing thereon, and also such other buildings as she should, during the term, erect on the premises.

It appeared, that immediately previous to this, and on the 31st of *July*, 1800, the heir at law of the last surviving trustee had conveyed the property in fee to seven new trustees, to hold upon the trusts originally declared, and *Feast*, the minister, was a party to the conveyance.

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This information and bill, filed by the Attorney-General at the relation of the present minister of the chapel, sought to set aside the lease of 1800. The property had increased in value, in consequence of the improvement of the neighbourhood, and the erection of houses on the property, and it was alleged (though not distinctly proved), that the property was worth 100*l.* a year in 1800, and between 300*l.* and 500*l.* a year at the present time.

Mr. *R. Palmer* and Mr. *Humphreys*, in support of the information, argued, that a lease for ninety-nine years of charity property was void, and secondly, that the lessee had either actual or constructive notice of the trusts affecting the property.

Mr. *Roupell* and Mr. *Ellis*, and Mr. *Lloyd* and Mr. *J. H. Palmer*, for the Defendants, who claimed under Mrs. *Stickney*, insisted on the validity of the lease, and that at the time it was executed, she had no notice that the property belonged to a charity.

Mr. *Cankrien*, for the trustees.

The following authorities were relied on: *Attorney-General v. Lord Hotham* (a); *Attorney-General v. Pilgrim*,

(a) *Turn. & R.* 209.



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There are two questions in this case. First, whether this lease was an improvident one, and secondly, whether the lessee had notice that the property was as charity property.

With respect to the first question, I entertain no doubt whatever, that this, as a lease of charity land, if made to a lessee cognizant of that fact, cannot be sustained in this Court.

It is perfectly true, that the inadequacy of rent is not itself sufficient to avoid a lease of charity property, unless it be excessive. It is always, however, a matter to be considered, and I apprehend, that where that observation made

- (a) 12 Beav. 57; 2 Hall & Tw. 186.
- (b) 6 Beavan, 288.
- (c) 6 Ves. 452.
- (d) 10 Ves. 555.
- (e) 13 Ves. 565.
- (f) 2 Beavan, 420; 3 Beavan, 425.
- (g) 3 Beavan, 91.

- (h) 4 Beavan, 453.
- (i) 6 Beavan, 150.
- (k) 17 Ves. 283.
- (l) 18 Ves. 315.
- (m) 18 Ves. 319.
- (n) 2 Russ. 306.
- (o) 1 Hare, 55; 1 Phil. 244.
- (p) 2 Hare, 249.

**made** by Lord *Eldon* and Sir *Thomas Plumer*, the inadequacy of rent was the only ground for setting aside the lease. In this case, there are various other circumstances which are material to be borne in mind. In the first place, it is apparently nothing more than a mere husbandry lease for a period of ninety-nine years. That of itself, as far as I am acquainted with the decisions, makes it a lease which this Court will not allow to stand. In addition to that, the Court must look at the covenants in the lease, and in this, there is one of a very singular description, namely, that the lessees shall be entitled, at the end of the lease, to take away any buildings they may have put upon the land. That of itself, particularly in the neighbourhood of a town, would be considered an exceedingly improvident provision in a lease. It is not necessary to go through the authorities upon this subject, which all concur, that this, as a lease of charity land, could not be supported in this Court. The cases on the subject are perfectly clear and distinct, and in the case of a lease of charity land, the Court holds, that the burden of proof lies upon the lessee to prove that it is a proper lease.

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Being of opinion, therefore, that this lease, which was a lease of this property for ninety-nine years at a rent of 4*l.*, with a covenant, by which all the buildings might be taken away at the conclusion of the lease, was not a provident lease, I am of opinion, that if the lessee, at the time she took the lease, was aware that it was charity property, it is not a lease which can be supported. I think the fact that there was 300*l.* paid as a premium, and that there was also a surrender of another lease, which had then thirty years to run, would not affect the question, because, in the first place, a premium of 300*l.* would not be sufficient, in my opinion, upon the evidence

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dence which is before me, to show, that this would be a proper and provident lease; nor would the surrender of the prior lease affect the question, for if the lessee had notice that this was charity property, she knew that the prior lease of a similar description was invalid, and could not, therefore, be taken into account, as increasing the consideration.

The next question to be considered is that of notice because, undoubtedly, if the lessee took this land without any knowledge whatever that the lessors had anything but the absolute fee simple, and the power of disposing of it as they thought fit, I should, as at present advised, unless I had some strong authorities to show me that the Court was compelled to set aside lease of that description, hold, that the lessee was purchaser *pro tanto* for valuable consideration without notice, and entitled to maintain that lease (a), unless the lessees could be put in exactly the same situation they were in at the time the lease was granted, which here would evidently be impossible.

The question here is, whether the lessee had notice that this was charity property, and I am of opinion that she had. The state of the case was this:—A lease had been granted of this property in 1730, for ninety-nine years. *Elizabeth Stickney* was the person, who, under the various assignments or devolution of title, had become the absolute owner of that lease, such as it was. She applied or was applied to (and it is immaterial for the purpose of my present observations to inquire which) to surrender that lease, and to have a new one granted for ninety-nine years, at the same rent, paying a premium. Now the lessors, in the lease of *September*, 1800, are none of them the

(a) See *Attorney-General v. Wilkins*, post.

the lessors of the original lease, and she would, in my opinion, as every person would do, naturally inquire, what right these persons had to grant a lease. A person who has taken a lease from *A. B.*, does not afterwards, when that lease expires or is surrendered, take a lease from *C. D.*, without seeing what title *C. D.* has to the property from *A. B.* Here is a lease granted in 1730, for ninety-nine years, of which thirty years being unexpired, seven gentlemen, none of them being the original lessors, offer to grant a new lease for ninety-nine years upon the surrender of the old. It is obvious, that the first question which the lessee must ask, and is bound to ask, is, what title have you to grant any such lease? because it would naturally follow from the first lease, without inquiring into the title of the lessors, that the surviving lessors, or the heir at law of the surviving lessor, would be the persons to grant that lease. It appears accordingly, by a deed which is produced in evidence, that, six weeks previously, that is, on the 31st of *July*, 1800, Mr. *Author*, the heir of the surviving lessor, conveyed this property to the new lessors. I am of opinion that the lessee was necessarily put upon inquiry, and was bound to inquire, how the title of the original lessors was conveyed to the new lessors, so as to justify her in surrendering the lease to them. If so, she must have been told, that there was a conveyance from the heir of the surviving lessor to these lessors. A conveyance was accordingly made, about six weeks prior to this time, and most probably for the purpose of this very transaction. Upon looking at that deed, I find it states the trust, in full and explicit terms.

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This itself would be sufficient to fix her with notice of the trust; but it appears to me, that the case does not rest there. A person does not take land from mere  
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strangers out of possession, professing to grant a lease, without knowing that they have some right to grant it; for it is to be observed, that the lessee herself was in possession of the whole of this property under the original lease; so that, independently of the conveyance from the heir of the surviving lessor, there was not even a *prima facie* title in the new lessors. In addition to that, Mr. *Feast*, the dissenting minister of *Beverley*, is made a consenting though not a demising party to this lease. The natural observation is, why was he made a consenting party to this lease? It must have been in respect of some interest that he had. The lessee would ask, why do you make a mere stranger to assent in your lease? The answer is, that he has an interest in the property. What interest? Why, an interest as the dissenting minister of *Beverley* for the time being, for whose benefit this trust was created. The natural inference (as this was done by interlineation, the deed resembling the former deed in all particulars, except the introduction of this person) is, that the lessee, requiring the lessors to show how they were entitled to grant the renewed lease, and to accept a surrender of the old one, saw, or had notice of the deed from Mr. *Author* to them, and consequently perceived, that it would not be safe to enter into the arrangement, unless the *cestui que trust* of the property bound himself, so far as he was concerned, not to disturb the matter; and no doubt the effect of his joining was, that he personally could not have complained of this transaction, because he would have been estopped by his consent to the demise. I am of opinion, therefore, that the lessee must be presumed to have known what interest the lessors and the person who consented to the demise and joined in the deed had in the property. If so, there is distinct notice of what the trusts were which affected it.

But

**B**ut even if the lessee in this case really did choose to take a lease from mere strangers out of possession, with the consent of a dissenting minister, without knowing anything of their interest in the property, I think this so improbable, that I must, in the absence of clear evidence to this effect, hold, that the lessee did what she was bound to do, namely, inquire into the state and title of the property, and that she is therefore affected by notice. If she made no inquiry, she must be treated in the same way as if she really did know the exact state of the property, at the time the lease was taken, and which I have no doubt was the fact.

**I** am of opinion that this lease cannot stand. It must be set aside, and there must be an account of the rents from the time of the filing of the information.

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## PAGE v. COOPER.

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A trust for sale of real estate held not to authorize a mortgage.

Real estate was conveyed to trustees upon trust to "sell and dispose" thereof, and, out of the money to arise, "levy, raise and pay, two sums of 150*l.* and 1000*l.*, and invest the residue of the monies to arise, for the husband and wife for their lives, and afterwards for their children, and, in default, as the wife should appoint by will. Held, that the trustees were not justified in raising these two sums by mortgage, inasmuch as a conversion of the estate into money, out and out, was intended.

THIS case came before the Court upon a general demurrer to a bill, which stated as follows :—

In 1832, on the marriage of *Frederick Cooper* with *Hannah Steward*, a settlement was executed, by which it was agreed, that two-thirds of an estate to which *Steward* was entitled should be conveyed to three trustees, upon trust that they "should, as and when it should to them or him seem meet, sell and dispose of the said leases, and out of the monies to arise from such sales, pay the costs; and, in the next place, "levy, raise and pay the debts of *Hannah Steward*, not exceeding 150*l.*; and "should also levy and raise such sum of money, not exceeding 1,000*l.*, as *Frederick Cooper* should" direct, and pay it to him; "and, subject to the raising and payment of the several sums thereinbefore mentioned, should lay out and invest all the residue of the money from such sale or sales," upon security, and should stand possessed thereof, in trust, for the wife for life, and as to a moiety for the husband for life, and then for the children. In default of children (which happened) *Hannah Steward* had a power of appointing the "trust monies, funds, and securities," by will.

The estate was accordingly conveyed in 1836, and *Hannah Cooper*, by her will, appointed the trust funds to her executors, upon trust, out of the trust monies, estates, funds, and securities, to raise 2,000*l.* for her husband; and she gave her husband a life interest in the residue, with remainder over to five other persons.

She

She died without issue in 1837. By an indenture of the 4th of *June*, 1839, and made between the trustees of the settlement of the first part, *Frederick Cooper* of the second part, the executors of the third part, and *Chasemore* (a mortgagee) of the fourth part, after reciting the above matters, and that *Frederick Cooper* had directed the trustees of the settlement to raise the 1,000*l.* for him; and that the executors had required the immediate payment of the 2,000*l.* to enable them to discharge the legacy of 2,000*l.* given to the husband; and also reciting, that the trustees of the settlement, considering that an immediate sale of the hereditaments 'would be inexpedient to the parties beneficially interested therein,' had requested *Chasemore* to advance 1,010*l.* on mortgage; it was witnessed, that the trustees conveyed the hereditaments to *Chasemore* for a term of 500 years, subject to redemption on repayment of 1,010*l.*

*Chasemore's* mortgage afterwards became vested in the Plaintiff *Page*, who filed this bill, stating the above matters; and further stating, that the Defendants pretended, that the said indenture of settlement of the 25th day of *September*, 1832, authorized only a sale of the real states therein comprised, and did not authorize a mortgage thereof; and that the execution by the said *John Cole*, *Thomas Cooper*, and *James White*, of the indenture of mortgage, was a breach of trust, and that the Defendants made other objections to the validity of the Plaintiff's mortgage security. The Plaintiff charged the contrary, and prayed repayment of the amount due, or a foreclosure against all parties interested.

To this bill, some of the parties claiming under the  
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will (but not *Frederick Cooper*), filed a general demurrer.

Mr. *Roupell* and Mr. *Haynes*, in support of the demurrer. It is settled, that an absolute trust for sale, where there is an intention to convert out and out, does not authorize a mortgage, *Haldenby v. Spofforth* (a). It is different when the object is to raise a charge but still preserve the estate. The distinction is well explained by Lord *St. Leonards*, in *Stroughill v. Anstey* (b). He says, "My own opinion is, that, generally speaking, a power of sale out and out, for a purpose, or with an object beyond the raising of a particular charge, does not authorize a mortgage; but that, where it is for raising a particular charge, and the estate itself is settled or devised subject to that charge, there it may be proper, under the circumstances, to raise the money by mortgage, and the Court will support it as a condition of sale, as something within the power, and as a proper mode of raising the money."

A mortgage might be extremely prejudicial to the parties interested, for an estate mortgaged for much less than its value might be lost by foreclosure, if the parties should be unable to redeem it within the time limited by the decree.

The Plaintiff may have a right to stand in the place of *Frederick Cooper*, but he has no right absolutely to foreclose the Defendants.

They also commented on *Mills v. Banks* (c), and *Ball v. Harris* (d).

Mr.

(a) 1 *Beav.* 390.

(b) 1 *De Ger. M. & C.* 645.

(c) 3 *P. Wms.* 1.

(d) 4 *Myt. & Cr.* 264.

**Mr. R. Palmer** and **Mr. G. S. Law**, *contrà*. It is too much to say, that a trust for sale in no case justifies a mortgage. It is matter of discretion. Lord *St. Leonards* so lays it down in *Stroughill v. Anstey* (a); he observes: "It ought, I think, to be considered, that in a case where trustees have a legal estate, and are to perform a particular trust through the medium of a sale, although a direction for a sale does not properly authorize a mortgage; yet, where the circumstances would justify the raising of the particular charge by a mortgage, it must be, in some measure, in the discretion of the Court, whether it will sanction that particular mode or not. It may be the saving of an estate, and the most discreet thing that can be done; and as the legal estate would go, and as the purposes of the trust would be satisfied, I think it impossible for the Court to lay down, that in every case of a trust for sale to raise particular sums, a mortgage might not, under circumstances, be justified."

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*Frederick Cooper* having required the immediate payment of his 3,000*l.*, the trustees, who had power to "levy and raise," did not act improperly by creating a mortgage. They were even justified in making a temporary charge, though the estate would ultimately have to be converted out and out. But even if the mortgage was not a proper mode of raising the money, still the produce was properly applied, and, until repayment, the legal estate cannot be taken from the Plaintiff. He has a right to stand in the place of *Cooper*, who has received the money, and is entitled to a sale. The bill prays a foreclosure; but, under the recent act (15 & 16 *Vict.* c. 86, s. 48), the Court may, on this bill, direct a sale. It cannot,

(a) 1 *De Gez.* M. & G. 642.



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cannot, therefore, be said, that the Plaintiff is entitled to no relief.

At all events, the Plaintiff ought to have leave amend his bill.

*The MASTER of the ROLLS.*

I am of opinion, that a mortgage of the property not authorized. It is obvious, on looking at the marriage articles, that the trusts on which the property was to conveyed to the trustees, were not simply to raise particular sums, for accomplishing which purpose a power of sale was given, but the trusts were to sell and convey out and out, and then apply the money in different ways—one of which was to pay *Frederick Cooper* sum of 1,000*l.* I think this case comes strictly within the instance pointed out by Lord *St. Leonards*, and that this is not a case, in which the trust is for the purpose of raising a particular charge and a power of sale is added for that purpose, in which case it may be satisfied by a mortgage of the estate, but it is a trust for the absolute sale and conversion of the property.

I am of opinion, that the mortgage is not authorized, and I must allow the demurrer; but I must give liberty to amend the bill. I am clear, on the authority of *Palk v. Lord Clinton (a)*, that assuming the Plaintiff to be entitled to relief against *Frederick Cooper*, he could not, upon a bill for foreclosure, be entitled to distinct and different relief. I am not, however, determining whether he is or not entitled to any relief against the other Defendants.

Allow the demurrer, and let the Plaintiff have liberty to amend.

(a) 12 Ves. 48.

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## MEADOWS v. MEADOWS.

**I**N 1843, and under the will of a testator, the *Burgersh* estate stood limited to *Rust (a) Meadows* for life, with remainder to his eldest son *John Meadows*, in tail male, with remainder to the brothers of *John Meadows* (of whom there were several) in succession in tail male, with remainder to *Charles Meadows* (the nephew of *Rust Meadows*) in tail.

*John Meadows*, being desirous of raising a sum of money to purchase an advowson, applied to his cousin *Charles Meadows* (the family solicitor), and he procured a loan from a client. Application was made by *Charles Meadows*, on behalf of *John Meadows*, to *Rust Meadows*, the tenant for life, to join in the mortgage, both to bar the entail, and to covenant to pay the interest during his life, and he consented thereto.

Accordingly, a deed was executed, by *Rust Meadows* and *John Meadows*, bearing date the 13th of November, 1843. It recited, that *Rust Meadows*, the tenant for life, had agreed to consent and covenant as after mentioned, upon the property being limited to the uses after mentioned; and then *John Meadows's* estate tail in remainder expectant on the death of his father, which was enlarged into a fee, was thereby conveyed, in the first place, to secure the mortgage, and the equity of redemption was then limited to the Plaintiff *John Meadows for life*, with remainder

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*A. B.*, a tenant in tail, subject to an existing life estate, borrowed money on mortgage, and the tenant for life joined in order to bar the entail, and he covenanted to pay the interest during his life.

By the same deed, the equity of redemption was resettled on *A. B.* for life, with remainder to his issue in tail, with limitations over. The Court, ten years afterwards, set aside the resettlement of the equity of redemption, on the ground that there was no proof of any contract to vary the existing limitations.

(a) The christian names are slightly varied to prevent confusion.

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remainder to his first and other sons in tail, with remainder to his daughters in tail male, with remainder to the uses of the testator's will subsequent to the devise in favour of the sons of *Rust Meadows* and their issue. The deed contained no powers of jointuring, or for providing portions for younger children; and it appointed *Charles Meadows* and others protectors of the settlement.

The effect of this settlement was, to cut down the estate tail of *John Meadows* to a life estate, and settle the estate on his issue in tail, and it excluded his brothers and their issue in favour of *Charles Meadows*, the ultimate remainder-man under the original will.

The Plaintiff, *John Meadows*, filed this bill in 185 seeking thereby (subject to the mortgage), to set aside the resettlement, on the ground that it had never been authorized, and that it had been prepared either fraudulently, or from a gross misapprehension and had been executed by the Plaintiff, in ignorance of its true purport and effect.

It was not disputed, that the brothers and their issue had been excluded by mistake, and this the Defendant offered to rectify; but it was insisted, that the Plaintiff's father had contracted for a resettlement of the estate at the price of his concurring in barring the entail and covenanting for the payment of the interest on the mortgage during his life.

Evidence was entered into, and, amongst other documents, the journal of *Charles Meadows & Co.* (the solicitors who prepared the deed) was produced, in which there was the following entry:—"Instructions for mortgage and settling the estate to the same uses as it is now

*now subject to—6s. 8d.*" In the bill of costs, the entry under date the 13th *September*, 1843, varied, and was—"Instructions for deed to bar the entail *and resettle the estate*, subject to the mortgage—13s. 4d."

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The attesting witnesses stated, that the deed had been executed without having been read over or explained.

The Defendant, *Charles Meadows*, submitted to a decree, and the only question was as to destroying the interest of the Plaintiff's child.

Mr. *Roupell* and Mr. *Amphlett*, for the Plaintiff, cited *Hoghton v. Hoghton (a)*.

Mr. *R. Palmer* and Mr. *R. W. Moore*, for the Defendant *Charles Meadows*.

Mr. *Waller*, for the trustees.

Mr. *Martindale*, for the infant child of *John Meadows*, who was first tenant in tail under the deed, cited *Bunbury v. Lloyd (b)*.

*The MASTER of the ROLLS.*

I am of opinion that this deed cannot stand. The case, which in many respects is painful, is, that the Plaintiff, in 1843, being desirous of raising a sum of money by mortgage, for the purpose of buying an advowson, gave instructions for this purpose to a relation, who was also the family solicitor. Upon the best consideration I can give the subject, my opinion is, that the instructions

(a) 15 *Beav.* 278.

(b) 1 *Jon. & L.* 638.

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instructions given for the preparation of this deed are accurately described in the journal, and that they were to prepare a mortgage and to leave the estate settled to the same limitations as it was then subject to. In the bill of costs, the expression is not the same; but it appears to me, that the reasonable inference is, that this is the correct statement of the instructions given.

No person should be bound by a deed, unless he knew or had a fair opportunity of understanding its nature and operation before he executed it. The Court would expect, that where existing limitations are to be altered, the matter should be explained, in a clear manner, to the person whose estate is to be affected. Here no instructions in writing were given either by *Rust Meadows* or *John Meadows*, or by the solicitor to the Conveyancer who prepared this deed. The oral instructions, by whomsoever given, are such as these:—"Prepare a mortgage and resettle the estate to the same limitations." In addition to this, the evidence is extremely unsatisfactory in showing that *Rust Meadows* gave any instructions at any time. It appears from the evidence of *Charles Meadows*, that certain instructions were given by *John Meadows* in the presence of the father, but I think the father had very little knowledge of what was to be done, until he was asked to covenant to pay the money. Mr. *Rouse*, who prepared the deed, in a marginal note, called the attention of the solicitor to it. The evidence entirely fails to show that any instructions were given for the resettlement, or that any explanation of the contents of the deed was given to *Rust Meadows*, or to the Plaintiff *John Meadows*, before the deed was executed; and in a conversation, *Charles Meadows* admits that to be the fact. On the whole of the evidence, I am not satisfied, that the Plaintiff knew what the contents of the deed were, until long afterwards, and I think that

**that** he must have supposed that the effect of the deed **was** simply to create a mortgage without touching the **existing** limitations of the estate.

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The whole matter was conducted in a most careless manner; verbal instructions were given to the solicitor, who gave verbal instructions to his partner, who verbally instructed counsel. Marginal notes were made by counsel on the draft, all of which were disregarded, and all the parties, at the time of execution, were ignorant of the provisions of the deed; all they knew was, that a good mortgage was created, and this was all that they meant to effect. In this state of the case, I feel satisfied, that according to the principles and doctrines of this Court, this deed cannot, as regards the resettlement of the property, bind persons so ignorant of what they were doing.

The usual practice is, on the execution of a deed, for **the** solicitor either to read or explain it to the persons **who** have to execute it, or the Solicitor informs them, **that** the deed is in accordance with some draft or copy **previously** explained or submitted to them, and the **parties** themselves, in these matters, usually trust their solicitor. In this case neither of these things was done.

I am also of opinion, that there was no stipulation on the part of the father, on his joining in the covenant, for a resettlement of the estate. The deed must therefore be set aside, so far as the limitations vary from those in the will of the testator, and the Defendant *Charles Meadows* must pay the costs.

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Dec. 1, 2.

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## BEALE v. SYMONDS.

A. B. makes a mortgage in fee, and dies intestate and without heirs. Held, that the equity of redemption does not escheat to the Crown, but belongs to the mortgagee, subject to the debts.

A. B. died in 1831, intestate and without heirs, having mortgaged his estate in fee. Held, that the mortgagee could not, in 1852, make a good title to the fee; for, although he took the equity of redemption as against the Crown, yet he held it subject to A. B.'s debts, and there was no proof of their having been satisfied.

Observations on the case of Viscount Downe Morris, 3 are, 394.

**THOMAS COWLEY** was the executor of *Sarah Ecklee*. In *March*, 1830, the property in question was sold and conveyed to *Cowley* for 615*l.*, subject to an outstanding mortgage in fee for 800*l.* Nothing appeared on the conveyance to show that *Cowley* had purchased otherwise than on his own account.

*Cowley*, who was illegitimate, died without heirs and intestate in *December*, 1831, and administration *de bonis non* of the estate of *Sarah Ecklee* was thereupon granted to *Elizabeth Allard*.

An indenture, dated the 12th of *August*, 1834, was made between *Ainsworth* and *Detherige*, (the mortgagees), of the first part, *Elizabeth Allard* of the second part, and *Samuel Beale*, a purchaser, of the third part, whereby, after reciting the will of *Sarah Ecklee*, and that *Thomas Cowley* was the sole executor thereof; that he had died intestate, and that the 615*l.* paid by him in *March*, 1830, was not his proper money, but that the purchase was made on behalf of and with part of the money belonging to the estate of *Sarah Ecklee*, and that by accident or neglect, he did not, in his lifetime, execute any declaration of trust, *Ainsworth* and *Detherige*, with the concurrence of *Elizabeth Allard*, conveyed the estate to *Beale* in fee.

*Beale* died in 1840, and his representatives having sold the property, the question was, whether under the circumstances they could make a good title to it? *The*

Master was of opinion that they could not, and exceptions were taken to his finding.

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Mr. Roupell and Mr. Shapter, for the vendors, in support of the exceptions. First, *Cowley* is proved to have purchased as a trustee under the will of *Sarah Ecklee*, and the whole interest passed by the conveyance from *Eizabeth Allard* (her administratrix *de bonis non*) to *Beale*. But secondly, if he had any beneficial interest in this property, it is proved that he was illegitimate, and that he died without heirs. His interest therefore in the estate did not escheat to the Crown; it became extinguished in the estate of the mortgagees, and passed from them to *Beale* by their conveyance in 1834. Escheat is a feudal doctrine, and so long as there is a legal tenant there can be no escheat. In either way a good title is shown.

Mr. Lloyd and Mr. Hoare, *contrà*, argued, first, that there was no sufficient evidence of *Cowley* being a mere trustee; secondly, that there was not sufficient evidence of his being illegitimate; thirdly, they argued, at great length, that *Burgess v. Wheate* (a) did not govern the case of an equity of redemption, which, upon the death of the owner without heirs, escheated to the Crown; and fourthly, that if the equity of redemption did not escheat, but merged in the estate of the mortgagees, still it was, in their hands, assets for the payment and satisfaction of *Cowley's* debts and engagements, which his administrator, when appointed, would be bound to see paid.

Mr. Roupell, in reply.

*Burgess*

(a) 1 *Eden*, 177.

1853. *Burgess v. Wheate* (a); *Burton v. Hodson* (b); *Henchman v. Attorney-General* (c); *Viscount Downe v. Morris* (d); *Davall v. New River Company* (e); *Jones v. Jones* (f); *Gordon v. Gordon* (g); *Middleton v. Spicer* (h); *Wilmot v. Pike* (i); *Fawcett v. Lowther* (k); *Walker v. Denne* (l); *Williams v. Lord Lonsdale* (m); *Taylor v. Haygarth* (n); *Pawlett v. Attorney-General* (o); *Onslow v. Wallis* (p); *Stapylton v. Scott* (q); *Blackburn v. Smith* (r); *Head v. Lord Teynham* (s); *Dodson v. Powell* (t); *Attorney-General v. Sudell* (u); *Cope v. Cope* (x); were cited.

The MASTER of the ROLLS reserved his judgment.

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The MASTER of the ROLLS.

This cause comes on upon exceptions to the Master's report, and the question to be decided is, whether a good title is shown by the vendor to a freehold messuage, called *Clarence House*, situate in the immediate neighbourhood of the city of *Gloucester*, which has been sold under the directions of the Court. The Master was of opinion, that a good title was not shown to the messuage in question and has so reported; the vendor has excepted to that report.

The

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|--------------------------------------------------------|----------------------------------|
| (a) 1 <i>Eden</i> , 210, 217; 1 <i>W. Black</i> , 123. | (l) 2 <i>Ves. jun.</i> 170.      |
| (b) 2 <i>Sim.</i> 31.                                  | (m) 3 <i>Ves.</i> 752.           |
| (c) 2 <i>Sim. &amp; Stu.</i> 498.                      | (n) 14 <i>Sim.</i> 8.            |
| (d) 3 <i>Hare</i> , 394.                               | (o) <i>Hardres</i> , 465.        |
| (e) 3 <i>De G. &amp; Sm.</i> 394.                      | (p) 1 <i>M. &amp; G.</i> 506.    |
| (f) 8 <i>Sim.</i> 633.                                 | (q) 16 <i>Ves.</i> 272.          |
| (g) 3 <i>Swanst.</i> 470.                              | (r) 2 <i>Exch. R.</i> 783.       |
| (h) 1 <i>Brown's C. C.</i> 201.                        | (s) 1 <i>Cor.</i> 57.            |
| (i) 5 <i>Hare</i> , 14.                                | (t) 18 <i>L. J. (Ch.)</i> 237.   |
| (k) 2 <i>Ves. sen.</i> 300.                            | (u) <i>Pr. Ch.</i> 214.          |
|                                                        | (x) 1 <i>Mood. &amp; R.</i> 269. |

The title may be shortly stated thus. In *March*, 1830, *William Reeve* sold the messuage in question to *Thomas Cowley* the younger, for 1,415*l.*, of which 800*l.* was to be returned, for the purpose of paying off a mortgage in fee of the messuage to two persons of the names of *Chapman* and *Chadborn*. In other words, the equity of redemption, subject to that mortgage, was sold to *Cowley* for 615*l.* In *February*, 1831, the mortgage of 800*l.* was transferred by *Chapman* and *Chadborn*, who were paid off, to two persons of the names of *Ainsworth* and *Detherige*, who became the mortgagees with a power of sale, and in whom the legal estate was then vested. *Cowley* was the executor of the will of *Sarah Ecklee*, and he died intestate in *December*, 1831.

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On the 12th of *August*, 1834, an indenture was executed, under which it is alleged that *Samuel Beale*, the testator, became the absolute owner of the messuage, and the only question is, whether any person claiming by, through, or under *Cowley*, could make any claim to this property. If no such claim could be made, it is not disputed, that a good title can be made under the testator *Samuel Beale*. The indenture of the 12th of *August*, 1834, is made between the mortgagees *Ainsworth* and *Detherige* of the first part, *Elizabeth Alford* (who was the administratrix *de bonis non* of the estate of *Sarah Ecklee*, which had been granted to her on the death of *Thomas Cowley*) of the second part, and *Samuel Beale*, the testator, of the third part. It recites, amongst other things, the will of *Sarah Ecklee*, and that *Thomas Cowley* was the sole executor thereof; that he had died intestate, and that the 615*l.* paid by *Cowley* in *March*, 1830, was not his proper money, but that the purchase was made on behalf of and with part of the money belonging to the estate of *Sarah Ecklee*; and, further that by accident or neglect he did not,

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not, in his lifetime, execute any declaration of trust. The indenture then proceeds to convey the property by the parties of the first and second parts to the testator.

It is contended for the vendors, first, that there is distinct evidence that *Cowley* was a bare trustee, having no beneficial interest in the property, in which case, no conveyance is required from him or from any person claiming under him, inasmuch as the interest which he had, whether beneficial or nominal, was merely equitable. And there is no doubt or dispute, but that the legal estate had been duly vested in *Chapman* and *Chadburn*, and that it had been by them conveyed to *Ainscorth* and *Detherege*, who afterwards in 1834 conveyed it to *Beale*, the testator.

If however the Court should be of opinion, that there is not sufficient evidence to prove that *Cowley* was a trustee, then, it is submitted, that there is clear evidence to show that he was an illegitimate son, and that he died unmarried, and therefore without heirs; and consequently, it is contended, that thereupon, even if he had any beneficial interest, it was extinguished at his death, inasmuch as, according to the decision in *Burgess v. Wheate* (a) and the principles there established, no escheat of an equity of redemption to the crown took place.

On the first point, evidence is produced to lead the Court to the conclusion, that the recital in the indenture of August, 1834, is correct, and that *Thomas Cowley* had no beneficial interest in the property. The evidence is this: it consists of two receipts bearing date 11th

(a) 1 *Eden*, 177.

11th of *February*, 1831, signed by *Chadborn* the mortgagee, one acknowledging the receipt of 37*l.* 4*s.* 6*d.*, interest due on the mortgage, to *Chapman* and himself from *Cowley*, as executor of *Sarah Ecklee*, and the other of 14*l.* from *Cowley* in the same character, for the amount of *Chadborn's* bill of costs in the transfer of the mortgage; an account kept by *Cowley*, in which he charges, against *Sarah Ecklee's* estate, the payment in *March* of 64*l.* 10*s.* to *Abell*, who was the solicitor of *William Reeve*, the mortgagee, and an entry in the pocket book of *Cowley*, in which is an entry of this payment of 64*l.* 10*s.* to *Abell*, and the second declaration of *Edwin Allard*, a nephew of *Sarah Ecklee* and a legatee under her will, who alleges, that this house was bought from *Reeve*, in order to pay a debt due for bricks to *Sarah Ecklee*, and that *Beale*, the testator and subsequent purchaser of the property, was the solicitor of the mortgagee in possession, and that he duly accounted for the rents to *Elizabeth Allard*, the administratrix de bonis non of *Sarah Ecklee's* estate, but all which accounts have been destroyed.

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Although this evidence produces a strong impression on my mind, and induces me to think it highly probable that *Thomas Cowley* had no beneficial interest in the property, and that he was a mere trustee for the persons interested under *Sarah Ecklee's* will; yet after carefully considering it, I am of opinion, that the evidence is not sufficiently clear and distinct to justify the Court in compelling a purchaser to take a title depending on this evidence alone. I am therefore compelled to consider and express my opinion on the other questions which arise in this case.

On the next question, and which seems to have been the only other question argued before the Master, I have

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have arrived at the conclusion, that, even if *Thomas Cowley* had a beneficial interest in the property, no escheat took place, and that no interest belonging to him became vested in the Crown; and if the case rested there, I should entertain no difficulty in concurring with the excepting party, and in determining that a good title could be made.

.That *Thomas Cowley* was an illegitimate son is, in my opinion, established, by the entries in the parochial register, first of his baptism on the 13th of *June*, 1792, and next of the marriage of his parents on the 1<sup>st</sup> of *July* following; this is corroborated by the circumstances, that in the entry of his baptism, he is stated to be the illegitimate son of *Francis Pulfrey*, and by the evidence of *Mary Armstrong*, which is distinct on this point. It is also proved that he died without issue. It is therefore, in my opinion, established, that he died without heirs, and the question is, whether the beneficial interest, if any, which he had in this property, was extinguished by his death, so far as regards the Crown. I am of opinion that the Crown could claim no part of that interest; his interest, if any, was the right to an equity of redemption in a freehold messuage, subject to a mortgage in fee vested in *Ainsworth* and *Detherege*, and the question here is, whether the Crown could take away such interest by way of escheat.

Whether trust estates could escheat to the Crown was originally a question of great nicety, and it was determined, after great care and a most elaborate investigation and argument, in the well known case of *Burgess v. Wheate* (a); and unless that decision can be in principle

(a) 1 *Eden*, 177; 1 *W. Black*, 123.

ciple distinguished from this, or unless it has been  
 ten by subsequent authorities, it must, in my opinion,  
 en this case. That was the case of a trust and not  
 case of an equity of redemption, but I can discover  
 ground on which an equity of redemption should be  
 to escheat to the Crown, which would not apply  
 ally to the case of a mere trust. The principle I  
 ehend to be, that neither the Crown nor the lord  
 enter or seize where there is a legal tenant in pos-  
 ion; the right to the service of the tenant in posses-  
 being all that the Crown or the lord can of right  
 ire. Although many cases to which I was referred  
 t out distinctions between a mere trust estate and  
 quity of redemption, yet, so far as regards the right  
 he Crown or the lord which may accrue by escheat,  
 strict analogy between them is acknowledged by all  
 three eminent Judges who delivered their opinions  
 at case, who agreed in this respect, although they  
 red in their final conclusion. And Sir *T. Clarke*,  
 R. and Lord *Henley*, then Lord Keeper, differing  
 his respect from Lord *Mansfield*, distinctly express  
 r opinion, that in such a case there would be no  
 eat to the Crown.

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he case of *Burgess v. Wheate* has no doubt been the  
 ect of much comment and discussion, and much dif-  
 ce of opinion; but as far as I am aware, it has been  
 ted as law in every subsequent case. In *Taylor v. Hay-*  
*h*(a) Sir *L. Shadwell* said, "Whatever opinion might  
 e been originally entertained about *Burgess v. Wheate*,  
 is remained unreversed for more than eighty years,  
 consequently, it must be considered as binding on  
 Court." The same principle was acted upon by the  
 present

(a) 14 Sim. 16.



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present Lord Justice *Knight Bruce* in the case of *Davall v. New River Company*(a), and it has been recognised in various other cases which were cited at the bar. The only case which appears to me to militate against the decision in *Burgess v. Wheate* is the case of Viscount *Downe v. Morris* (b); and upon the most careful consideration of that case, it appears to me, that if followed, it would affect or qualify the decision in *Burgess v. Wheate*, unless it be considered as meant merely to establish the following proposition, which however would appear to me to be new, viz., that if a term of years is vested in a termor, and subject to that term the reversion in fee is vested in another, if the termor should mortgage his term and die without heir and next of kin, then that, in every such case, the reversioner of the fee would be entitled to redeem the mortgage of the term. It is however to be observed that the Vice-Chancellor, in deciding that case, expressly admits the authority of *Burgess v. Wheate*, and considers that that case did not, in any degree, affect or touch the case then before him. I am therefore of opinion, that the case of *Burgess v. Wheate* is not only not touched, but that it is confirmed by the subsequent decisions; that it governs this case, and that consequently, there was no escheat to the Crown, and that no difficulty in respect of any claim in that quarter can arise to invalidate the title of the testator.

But the next difficulty, and that which struck me forcibly on the argument of this case, is this, whether, though the title of the mortgagees, who possess the legal estate, is perfectly good to the whole messuage against the Crown, it can be considered as equally good against the creditors of *Thomas Cowley*; in other words, whether,

(a) 3 De G. & Sm. 394.

(b) 3 Hare, 394.

f *Thomas Cowley* had been beneficially entitled to the equity of redemption, that interest did not, but, become assets for the payment of his debts, or a creditor of *Thomas Cowley* might not object to the administration to his estate, and thereupon the mortgage vested in *Ainsworth* and *Detherege*.

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case, *Thomas Cowley* died on the 20th of 1831, that is, upwards of twenty-one years although all ordinary debts would be barred, but that a debt on covenant not yet broken may nevertheless have arisen at this moment. It is, with respect to that, that I give way to an objection of this kind, which, in the present case, is certainly of a very strong description; but I do not see in what way, that a good title can be made to this property in the absence of the concurrence of the legal representative of *Thomas Cowley*, without affirming a distinct proposition, that the mortgagees, as legal estate, could hold the whole property against the equity of redemption against the estate of *Thomas Cowley*. There is certainly nothing in *Burgess v. Wheate* to countenance such a proposition; on the contrary, the learned Judges expressed their disapproval against saying a word to establish the title. Sir *Thomas Clarke* observes, that if it were necessary for them to come into equity, in order to do so, they would derive no assistance from it. It is true, that in the present case, the establishment of such a principle might probably be productive of no injury, but if once established, it would be a case where the property mortgaged was ten times the value of the mortgage upon it, and the mortgagees' debts far exceeding the amount of the mortgage. It would work a gross injustice if the law were, that without heir of a man living on his estate

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and contracting several debts, one of which alone is secured by mortgage of his property, should give the whole estate to that mortgage creditor, in value far exceeding the amount for which he had contracted, and deprive all the other creditors of the means of getting payment of their debts.

I cannot, as I think, determine that a good title has been shown to this property, without affirming that proposition, which I believe to be contrary both to principle and authority, as far as any authority is to be found on the subject. I must therefore affirm the Master's report, and disallow the exceptions. As however the ground upon which I proceed appears to differ from that on which the Master came to his conclusion, and as I differ with the Master on that conclusion, I must overrule the exceptions without costs.

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## SWINBORNE v. NELSON.

The Plaintiff's right to discovery and to production rest on the same principle.

IN 1837, *Nelson* obtained a patent for the manufacture of "isinglass," and in 1839, he obtained a patent for making "gelatine."

In


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ant who submits to answer must answer fully; he cannot, by denial of the Plaintiff's title, escape answering. Discovery of title-deeds and of professional communications forms an exception.

The Plaintiff and Defendant had both patents for making gelatine. The Plaintiff instituted his suit for redress against an alleged infringement of his patent, and the bill contained searching questions, requiring the Defendant to set forth all the articles manufactured by him, the names and addresses of his customers, the prices and the profits, &c. The Defendant denied all infringement. He said he had made his articles according to his own and not according to the Plaintiff's patent, and he declined to give an account of such articles. Held, that, notwithstanding his denial, he was bound to do so.

Dissent from the doctrine laid down in *Adams v. Fisher*, 3 *Myl. & Craig*, 526.

In 1847, *Swinborne* obtained a patent for making "gelatinous substances," the specification of which he enrolled on the 24th of *May*, 1848. The Plaintiff by this bill alleged, that the Defendants had infringed their patent, by manufacturing articles sold by them as "gelatine" and "isinglass," by a process substantially similar to the process described in the specification of the 24th of *May*, 1848, or only colourably differing therefrom; and alleged, that the Defendants had resorted to various subtle arts and contrivances to conceal the infringement.

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The bill charged, that the Defendants, after the 24th of *May*, 1848, altered their mode of manufacture; that several articles now manufactured and sold by the Defendants, by the names of "*Nelson's Patent Refined Isinglass*," &c., and which were then manufactured and sold by them in large quantities, were imitations of the same names respectively manufactured and sold by the Plaintiff, and the one could not, but with great difficulty, be distinguished from the other; and that the articles so manufactured and sold by the Defendants could not have been manufactured by either of the processes, described by *Nelson*, under his "isinglass" patent, or his "gelatine" patent, by any process known to or practised by the Defendants, previously to the 24th of *May*, 1848, and that they had been manufactured by them, for the first time, since the 24th of *May*, 1848, and they had, in fact, been manufactured by them by an imitation of the process, or some material part of the process, of *Swinborne*, as described in the specification. The bill charged, that it would so appear, if the Defendants would set forth, when they first manufactured, and to whom by name they first sold, any and what quantity of the articles then manufactured and sold by them, under the names of "*Nelson's Patent Refined Isinglass*," &c. respectively.

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tively, and from what substance the same respectively were manufactured, and what were the respective processes of such manufacture.

The bill also charged, that the Defendants "ought to set forth an account of all articles manufactured and sold by them, since the 24th of *May*, 1848," under the names of "*Nelson's* Gelatine Isinglass," &c., and the quantities thereof respectively, and the names and addresses of the persons to whom sold and at what prices, and the profits which the Defendants had realized thereby.

The bill prayed an account of all the articles manufactured by the Defendants since the 24th of *May*, 1848, under the names of "*Nelson's* Gelatine Isinglass," &c., and the profits made thereby, and for payment to the Plaintiff of the amount, and for an injunction to restrain the Defendants from manufacturing those articles, or any other articles which were an imitation of the articles manufactured and sold by the Plaintiff, under the names of "Patent Refined Isinglass," &c., and for infringing the patent rights of the Plaintiff.

The 13th interrogatory asked the Defendants to set forth, when they first manufactured, and to whom by name they first sold, any and what quantity of the said article now manufactured and sold by them under the said names of "*Nelson's* Patent Refined Isinglass," &c. respectively, and what were the respective processes of such manufacture.

A subsequent part of the same interrogatory required the Defendants to set forth an account of all articles manufactured and sold by them, since the 24th of *May*, 1848, under the names of "*Nelson's* Gelatine Isinglass," &c.

&c. and the quantities thereof respectively, and the names and addresses of the persons to whom sold and at what prices, and the profits which the Defendants had realized thereby.


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The principal Defendant, by his answer, denied the novelty and utility of the Plaintiff's alleged invention. He also denied, altogether, the infringement by him of the Plaintiff's patent, and the circumstances alleged in respect to it. He denied that the articles were manufactured by him, by any process which was an infringement or imitation of the Plaintiff's processes described in his specification, and he said, that the processes by which such articles had been manufactured since the 24th *May*, 1848, were the same as those used by him previously to that date, except that the slices of hide or skin had been cut rather thinner, previously to the same being macerated in a caustic solution of alkali.

In answer to the 13th interrogatory, the Defendant "submitted, that he was not bound, and ought not to be required to set forth, when he first manufactured, or to whom by name he first sold, any or what quantity of articles now manufactured and sold by him under the names of '*Nelson's Patent Refined Isinglass*,' &c. respectively, or from what substances the same respectively were manufactured."

He "denied that the Plaintiff had recently discovered, or that it was the fact, that since the 24th of *May*, 1848, the Defendants had infringed the letters-patent dated the 24th of *November*, 1847, in the manufacture of the articles manufactured and sold by him, under the name of *Nelson's Patent Opaque Gelatine*, or by cutting the residuum after the first solution had been taken, as described in the *Gelatine Patent*, into thin slices, or by

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by subjecting the same to the solvent action of water, or by any such or the like or any other process, in imitation of the process described in the specification dated the 24th of *May*, 1848, or in lieu of the subsequent process described in the Gelatine Patent."

He admitted, that since the 24th *May*, 1848, he had manufactured and sold, and "continued to manufacture and sell large quantities of the articles called '*Nelson's Patent Opaque Gelatine*,' but he denied, that he so manufactured and sold the same by means of such infringement, as in the bill mentioned."

He "submitted that he was not bound, and ought not to be required, to set forth an account of all articles manufactured and sold by him since the 24th *May*, 1848, under the names of '*Nelson's Gelatine Isinglass*,' &c., or the quantities thereof respectively, or the names or addresses of the persons to whom sold, or at what prices, or the profits which he had realized thereby."

The Plaintiff took exceptions to the Defendant's answer, insisting that the 13th interrogatory had not been answered. The exceptions now came on for argument.

Mr. *Lloyd* and Mr. *Bagshawe*, in support of the exceptions. The answer to the 13th interrogatory is clearly insufficient. The Defendant does not affect to answer that interrogatory, but submits he is not bound to do so. The rule of the Court is clearly established, that if a Defendant chooses to answer a bill, he must answer it fully; *Mazarredo v. Maitland* (a); *Lancaster v. Evors* (b). A party cannot, by denial in his answer of the Plaintiff's title, relieve

(a) 3 *Maddock*, 66.

(b) 1 *Phill*. 349.

relieve himself from the obligation of giving a full discovery. He cannot, as in this case, draw his own conclusions as to the law and facts, and then withhold the discovery of the circumstances necessary to test the accuracy of his own conclusions in his own favour. Here the denial of title itself is insufficient, *Edwards v. Jones* (a). The Defendant does not bring himself within the principle of *Adams v. Fisher* (b). There the question was as to production, upon the admissions of the Defendant; here the point is as to the sufficiency of the answer.


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Mr. R. Palmer and Mr. Baggallay, *contrà*. The question is, what discovery is the Plaintiff entitled to in this stage of the cause? A Plaintiff is not entitled to any discovery he may choose to ask; his right is limited, and the rule, as stated by Sir James Wigram, is this:—that a Plaintiff is only entitled to such discovery as is necessary for the decision of the issue. The rule as to answering fully does not apply, where the discovery is not material to the relief sought by the bill; *Wood v. Hitchings* (c); *Simpson v. Chapman* (d). The complaint here is of the infringement of the Plaintiff's patent, which is wholly denied by the Defendant. Until that point has been decided, what use can it be to set forth voluminous accounts of all the articles, and the quantities and prices and profits of articles sworn to have been manufactured by the Defendant's new process, and all the names and all the addresses of all the Defendant's customers; nay, what right can the Plaintiff have to such a discovery? He is entitled to an account of pirated articles,

(a) 1 Phill. 501.  
(b) 2 Keen, 754; 3 Myl. & Cr. 528.

(c) 3 Beav. 504.  
(d) 15 Jur. 714.



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titles, but of no others. Where the title is denied, a Defendant is not bound to set forth the consequential accounts; *Gethin v. Gale* (a); *Sweet v. Young* (b); *Jacobs v. Goodman* (c); *Hall v. Noyes* (d); Marquis of *Donegal v. Stewart* (e); *Phelips v. Caney* (f); *Neuman v. Godfrey* (g). The case of *Adams v. Fisher* (h) proceeded on the same principle; there the title of the Plaintiff being denied, it was held, that he was not entitled to a production of documents in the Defendant's possession, which did not tend to make out such title. The only way for a Defendant to protect himself is by answer, a plea is inappropriate, and could not be framed in a matter of such complication as the process of a manufacture.

Secondly.—The discovery asked is of a most oppressive and vexatious nature. The Court has shown an unwillingness to sanction inquisitorial discovery, *Dos Santos v. Frietas* (i); where the Court observed, "that if the Court were to enforce this species of inquisition into a man's private affairs and business, the sooner its doors were closed the better, for it would be a scourge to the country." If the present course be sanctioned, a party, by a mere allegation of an infringement of his patent, might compel a rival trader to reveal all his secrets, and disclose the names of his customers, and the profits, accounts and every other transaction relating to his trade, however immaterial it might be to the matters in issue. The Court has frequently limited the Plaintiff's

(a) Cited 1 *Amb.* 354.

(b) 1 *Amb.* 353.

(c) 3 *Bro. C. C.* 487, n.

(d) 3 *Bro. C. C.* 483.

(e) 3 *Ves.* 446.


(f) 4 *Ves.* 107.

(g) 2 *Bro. C. C.* 332.

(h) 3 *Myl. & Cr.* 526.

(i) *Wigram on Discovery*, 2nd ed. 168; and see *Small v. Attwood*, *ib.* 168; *Janson v. Solarte*, 2 *Y. & Coll. (Ex.)* 127; and *Earl of Portsmouth v. Fellows*, 5 *Mad.* 451.

tiff's right to discovery by a positive order. Thus in the Earl of *Stafford v. Blakeway* (a) a plea of the Statute of Limitations was ordered to stand for an answer, with liberty to except, "but not to oblige the appellant to make any discovery of the value or particulars of the real or personal estate" of the testator. In *King v. Holcombe* (b) "the plea was ordered to stand for an answer, with liberty to except, but not as to the account." The same was done in *Bayley v. Adams* (c), and in *Wedderburn v. Wedderburn* (d), where the plea was ordered to stand for an answer, with liberty to except, "but the Plaintiffs were not to call for any account of the profits of the trade since the 1st of *May*, 1801."

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Although the Master may not have such an authority, the Court has the power of modifying the general rule and restricting the discovery within those limits which are essential for the purposes of justice. This may perhaps explain the difference in practice between this Court and the Exchequer, where exceptions were argued, in the first instance, before the Court and not before the Master.

*Somerville v. Mackay* (e); *Rowe v. Teed* (f); *Shaw v. Ching* (g), were also cited.

Mr. *Lloyd*, in reply.

The MASTER of the ROLLS reserved judgment.

The

(a) 6 Bro. P. C. 633.

(b) 4 Bro. C. C. 440.

(c) 6 Ves. 599.

(d) 2 Keen, 782, note; and see

*Story v. Lord Windsor*, 2  
 Atk. 632.

(e) 16 Ves. 382.

(f) 15 Ves. 372.

(g) 11 Ves. 303.

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v.

NELSON.

Jan. 28.

*The MASTER of the ROLLS.*


The question that arises in this case is, whether the Defendant has sufficiently answered the Plaintiff's bill. The Plaintiff is possessed of a patent for the manufacture of isinglass, and he charges the Defendant, who is a manufacturer of isinglass, with having infringed his patent, and he asks for an account of the Defendant's dealings and transactions, and seeks to make him answerable for the profits made by him in his manufacture of isinglass, according to the process discovered by the Plaintiff.

The interrogatories in question relate to these dealings and transactions of the Defendant and the profits made by him in his business. The Defendant admits that he has not answered these interrogatories, but he contends that he is not bound to answer them, and he rests his defence on this principle:—that he disputes the title of the Plaintiff. He denies the existence of that title; he contends that it is not, and that it will not be ever established, and he urges, that it would be an act of oppression upon him, and contrary to the rules and practice of this Court, to compel a Defendant to set out an account of the profits earned by him, when, in truth, it may and probably will turn out, that the Court will not, at the hearing, direct any account at all to be taken of those profits.

The Defendant relies, in support of his position, on the case of *Adams v. Fisher* (a), which has been the subject of much comment; and it was principally with

(a) 2 Keen, 754; 3 M. & Cr. 526.

with the view of more maturely considering that case, that I reserved my judgment on these exceptions. That case is generally understood to lay down, as a broad principle, that the right of the Plaintiff to see the documents, which are admitted by the Defendant to be in his possession, and to relate to the subject matter of the suit, and which are not otherwise protected, must depend upon the Plaintiff's having established his right to relief in that suit, or on the circumstance that that right is not disputed by the Defendant. Lord *Cottenham* rests his decision, refusing to permit the Plaintiff to inspect the documents in that case, on the circumstance, that the Defendant had denied the Plaintiff's title, and had stated upon his answer that, which, if true, would preclude the Plaintiff from instituting the suit against him.

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The first question to be considered is, whether the answering interrogatories rests on the same principle as the production of documents? and if that question be answered in the affirmative, the next question is, whether the decision in *Adams v. Fisher* precludes the Plaintiff from obtaining the discovery here sought?

With respect to the first question, it admits, in my opinion, of an easy answer. It is, I think, impossible to lay down one rule, on this subject, for the production of documents, and another for the answer to be put in to the interrogatory. Such a distinction would be, in truth, opposed to all principle and all authority, and it would be a mere technicality, which would be easily evaded, and would give rise to expense and delay. It is obvious, that if a Defendant, who could avoid producing a document, by disputing the Plaintiff's title, could not, on the same ground, avoid answering any interrogatory respecting it, the only effect of that rule

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rule would be, to induce the Plaintiff to introduce such interrogatories into the bill as would compel the Defendant to set out, at great length, the contents of the document in the body of the answer, instead of inserting the title of it in a schedule, and thus would render nugatory the existing practice of giving a schedule of documents, by which much expense and prolixity of proceeding has been avoided. I entertain therefore no doubt, that the production of documents and the answering interrogatories must, for this purpose, be treated as the same, and that the second question arises, and that the case of *Adams v. Fisher* must be considered, in conjunction with the other authorities applicable to this point, for the purpose of considering how far, on this answer, the Plaintiff is precluded from obtaining the discovery he seeks.


I have, in considering this question, examined all the cases that I am aware of which bear on this point, and I have also perused the various observations and comments of the various writers on this point, the settlement of which is of great importance, for the purpose of avoiding expense and delay in the future prosecution of suits. This point has been very fully and ably considered by the late Vice-Chancellor, Sir *J. Wigram*, in his work on Discovery, and who cites and comments on the principal decisions which touch on this subject—whose opinions also are entitled to great weight, and who does not hesitate to state, that prior to the case of *Adams v. Fisher*, he had considered, that in cases where the Defendant had submitted to answer, the rule of the Court was, to give to the Plaintiff the same full right of discovery before the hearing, as he would have been entitled to, if his right to relief had been admitted or proved, and the only question between the parties had been the amount of his demand.

*It*

It cannot, in my opinion, be denied, that a fundamental principle is to be found in all the decisions on this point, which is usually thus stated :—that a Defendant who submits to answer must answer fully. That is, that if a *prima facie* case for relief be made by the bill, calling for an answer, the Defendant may, if the circumstances of the case will permit it, bring forward any fact or series of facts, by way of plea, to dispute the right of the Plaintiff to call upon him to answer either the whole bill or some particular portion of it ; but that if he be unable or decline to adopt this course, he must, technically and categorically, answer every statement in the bill to which he is interrogated, which can assist the Plaintiff in making out his title to relief. “There is no difference,” observes Sir *William Grant* in *Taylor v. Milner* (a), “whether the Court has determined that the bill is such as the Defendant must answer, or whether the Defendant has, by his own conduct, precluded himself from raising that question.” The importance, as a matter of pleading, of keeping distinct these separate modes of pleading can scarcely be overrated. To determine, on plea or demurrer, that a Defendant must answer the bill or a particular portion of it, and then to allow him, by his answer, to contend that he is not bound to answer that very same portion of the bill, would not only be contrary to the rules and practice of the Court, but would be repugnant to good sense, and would create much confusion and expense. In truth, this repugnancy it is, which created the doctrine, which at one time was pushed so far and carried into such minute technicality, viz., that the demurrer or plea were overruled, by being coupled with an answer extending to

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(a) 11 Ves. 42.

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to the same matter which was covered by the demurrer or plea.

This principle, which, if kept within proper limits, is essential to prevent rules of pleading from falling into inextricable confusion, is not, in any degree, affected or varied by the cases referred to by Mr. *R. Palmer*, and of which the case of *Wedderburn v. Wedderburn* (a) affords a good instance. In that case, the Defendant had sought by plea to protect himself from answering questions relative to certain partnership accounts. The Court, on the argument of the plea, thought that this question could better be determined at the hearing of the cause, when the questions between the parties would be better understood, and accordingly, the Court directed the plea to stand for an answer, with liberty to the Plaintiff to except, but not so as to call for the accounts of the partnership subsequently to the 1st of May, 1801, which was the discovery sought to be protected by the plea. This case, and the others of the same class, corroborate instead of weakening the distinction adverted to. If this question could have been raised by the answer, where was the necessity of the plea? a form of pleading which could never have had any existence, if an answer would equally well have effected the same. The decision of the Court shows, not that the plea was not proper, or that the same point could have been raised by the answer, but that in this and in other cases of a similar description, the Court was of opinion, that the benefit of the plea might, in the circumstances of those cases, be safely and beneficially reserved till the hearing, which, in truth, admits and confirms the distinction referred to.

*It*

(a) 2 *Keen*, 732, n.

**It** is true, that this necessity of answering fully is limited in one or two cases, which do not however weaken or destroy the principle established. Thus, a Defendant is not compellable to produce the title deeds of his property, unless where the production of them is essential for the purpose of making out the title of the Plaintiff to the relief he asks; but this is, because in the other cases, where, for instance, the recovery of the deeds is the relief sought, as in the case of redemption, a list or description of them is all that the Plaintiff can require for the purposes of the suit. So also a Defendant is not bound to disclose confidential communications between himself and his solicitor; but this rests on a different principle, and not on the denial of the title of the Plaintiff, but on the principle that the Plaintiff's right to discovery does not extend to a discovery of the manner in which the Defendant intends to support his defence.

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**It** is not my intention to go through the list of authorities on this subject, which are collected and very ably commented upon, by Sir *J. Wigram*. It is sufficient for me to say, that although the earlier decisions are not decisive on this point, in *Rowe v. Teed* (a) and in *Somerville v. Mackay* (b), Lord *Eldon* expressed his opinion, that a Defendant could not answer as to part of a bill and refuse to answer the rest; and Sir *John Leach*, in *Mazarredo v. Maitland* (c) and — v. *Harrison* (d), treats this point as settled. In the former case, Sir *J. Leach* says, "A Defendant cannot, by answer, deny the Plaintiff's title and refuse to answer as to facts which may be useful evidence in support of that title. He cannot answer in part. If he answers at all, he must answer the whole of the bill;" and so it has,

as


(a) 15 Ves. 372.

(b) 16 Ves. 382.

(c) 3 Mad. 66.

(d) 4 Mad. 252.



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as I believe, always been considered to be, till the case of *Adams v. Fisher* arose.

I am disposed also to think, that it was not intended by Lord *Cottenham* to carry his decision to the extent that it has been considered to cover. According to the principle supposed to be established by it, if an executor should dispute the right of a legatee or the debt of the creditor suing on behalf of himself and others, he might resist setting forth the accounts of the estate of his testator which is a proposition at variance with the uniform and settled practice and decision of the Court; but I am disposed to believe, that, in truth, the decision in *Adams v. Fisher* was intended by Lord *Cottenham* to be limited to withholding the production only of the documents, which could not assist the Plaintiff in making out his title to the relief he sought; at least the observation made by his Lordship, respecting the admission of Counsel to the question put by the Court, seems to point to this result. However this may be, the authorities which relate to the subject were not commented upon or brought to the attention of the Court; and after the most careful consideration which I am able to give to this subject, I am of opinion, that if the case of *Adams v. Fisher* goes beyond the point I have last suggested, it is not in accordance with the long line of authorities before decided in this Court. As I have therefore to choose between that case and other cases decided by equally high authority, I feel myself compelled to follow those which are, in my opinion, consistent with the principles upon which pleadings in equity can alone be safely and clearly established.

I am therefore of opinion, that these exceptions must be allowed; but in the present state of authorities, shall give no costs on either side.

1852.

ABREY v. NEWMAN.

Dec. 13.

Jan. 29, 1853.

THE testator, after having given certain personal estate to his wife for life, proceeded as follows:— All the above-named property to be equally divided between *Benjamin James* and his wife *Ann James*, and *Charles Abrey* and his wife, for the period of their natural lives, after which, to be equally divided between their children; that is to say, the children of *Benjamin James* and *Charles Abrey* above-mentioned.

Request to be equally divided between *A.* and wife and *B.* and wife for their lives, after which, to be equally divided between their children, (i. e.) the children of *A.* and *B.* Held, that their children took *per capita*, and that on the death of *A.* and his wife, a moiety became divisible, equally, amongst the children of *A.* and *B.*

Mr. and Mrs. *James* were both dead, leaving four children; Mr. *Abrey* was still living, but his wife was dead, and they had nine children.


Mr. *Shebbeare*, for the Plaintiffs, the children of *Abrey*, contended, that the children of the two families took together *per capita*.

He relied on *Barnes v. Patch* (a); *Lady Lincoln v. Pelham* (b); *Smith v. Streatfield* (c); *Rickabe v. Garwood* (d); *Cunningham v. Murray* (e).

Mr. *Marrett*, for the children of *James*. The children of the two families take *per stirpes*. The testator had two families in his mind, and intended each to take a moiety of the property. This differs from the case of *Lady Lincoln v. Pelham* and others, where there

(a) 8 Ves. 604.  
(b) 10 Ves. 166.  
(c) 1 Mer. 358.

(d) 8 Beav. 579.  
(e) 1 De G. & Sm. 366.

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there was no previous gift to the parents of the class of children.

He relied on *Willes v. Douglas* (a); *Arrow v. Melish* (b); *Williams on Executors* (c); *Pearce v. Meades* (d).

Mr. *Bagshawe*, for the executors.

Mr. *Shebbeare*, in reply.

*The MASTER of the ROLLS.*

I will look at the cases.

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*The MASTER of the ROLLS.*

This case arises upon the construction of a will of a testator named *Henry George Hallett*, and the words of the bequest on which the question arises are these:—"All the above-named property to be equally divided between *Benjamin James* and his wife *Ann James*, and *Charles Abrey* and his wife, for the period of their natural lives, after which, to be equally divided between their children, (that is to say) the children of *Benjamin James* and *Charles Abrey* above-named."

*Benjamin James* and *Ann* his wife are both dead, leaving children; the wife of *Charles Abrey* is also dead, leaving children surviving her by *Charles Abrey*, who is still alive.

The question is, how the share of the property enjoyed by the children of *Benjamin James* and *Charles Abrey* is to be divided.

(a) 11 *Jur.* 702.

(b) 1 *De G. & Sm.* 355.

(c) Page 1154.

(d) 3 *Y. & Col.* 246.

joyed by *Benjamin James* during his lifetime is now to be divided? On one side, it is contended, that only the children of each parent can take the share of that parent, and that the children of *Benjamin James* will take the share given to him and his wife, and that the children of *Charles Abrey* will take only *Charles Abrey's* share.

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The cases of *Barnes v. Patch* (a); *Lady Lincoln v. Pelham* (b); and *Richabe v. Garwood* (c); decide, that a fund is to be distributed *per capita* and not *per stirpes*, when it is directed to be paid on a particular event, in such cases as the following, namely—where a fund is to be divided between the families of my brother *L.* and my sister *E.*—where one-fourth of a residue is to be paid to the younger children of *N.*, and one other fourth part to or among the younger children of *S.*—where a legacy is to be paid between and amongst the children of *P.* and the children of *R.* In all these instances, the Court has determined, that the distribution is *per capita* and not *per stirpes*, and many other cases might be cited to the same effect; such as *Malcolm v. Martin* (d); and *Pearce v. Edmeades* (e). Nor have I found any decision contradicting these.

What however creates a distinction, in the present case, is, that the share is given, in the first instance, to the parent, and the gift afterwards is to take effect on the death of that parent, and accordingly in the case of *Arrow v. Mellish* (f), where the gift was to this effect: “To her my wife, I give my worldly goods, money, and other effects for life; and at her death, I give the same  
to

(a) 8 Va. 604.

(b) 10 Ves. 166.

(c) 8 Beav. 579.

(d) 3 Bro. C. C. 49.

(e) 3 Y. &amp; Col. 246.

(f) 1 De G. &amp; Sm. 355.

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to my three nieces, viz., *Elizabeth*, *Catherine*, and *Sarah*, and also to *Mary Arrow*, to be by them equally divided, share and share alike, and at their deaths to go equally, share and share alike, to their children: the Lord Justice *Knight Bruce* held, that "*their children*" meant *their respective children*," and accordingly divided the fund *per stirpes*. His observations are these. "In this case, the words 'their children' must mean 'their respective children.' I have not a doubt in my own mind of the intention of the testator. The only question seems to be, whether I am bound by the decisions in *Malcolm v. Martin*, *Pearce v. Edmeades*, and *Smith v. Streatfield*, to decide in favour of Mr. *Crick*'s view of the will. I think, that not one of those cases compels me to do so, and I therefore decline doing so."

The case before me, however, is distinguishable from the case of *Arrow v. Mellish*, because the words here used by the testator seem to exclude the construction placed on the words of that will. Here it would not be possible to read the words "respective children," inasmuch as the testator, as if purposely to exclude that construction, has added the words, "that is to say, the children of *Benjamin James* and *Charles Abrey*." This construction is also confirmed by the case of *Smith v. Streatfield* (a), there referred to, which, without being identical, is, as nearly as possible, the case before me. In that case, the testatrix gave 4,000*l.* to trustees, to be invested, and the interest to be paid "one-half to my cousin *Sarah*, and the other half to my cousin *Elizabeth*, during the term of their natural lives; and as their lives drop and expire, I direct that the principal and interest be received, and be equally divided among their children, when they shall severally attain the age of twenty

one

(a) 1 *Mer.* 358.

one years." *Sarah* died without issue, and it was held, that her share thereupon vested in the children of *Elizabeth*, on their attaining twenty-one.

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This is very close to the present case, and, in my opinion, is in accordance with the other authorities to which I have referred, and must govern the construction of this will. I am consequently of opinion, that upon the death of *Benjamin James* and his wife, their share was divisible *per capita* amongst the children of *Benjamin James* and of *Charles Abrey*.

The costs must come out of the estate.

CONGREVE v. PALMER.

1852.

Dec. 15.

Jan. 29, 1853.

THE testator, *James Grinston*, by a codicil made to his will, and dated the 9th of *November*, 1820, increased a legacy of 2,000*l.*, bequeathed by his first codicil to trustees for the benefit of *Mr. Cole* and his wife (the testator's daughter), and their issue (exclusive of an eldest son), to 3,000*l.*, but he directed, that if *Mr. Cole* should survive his wife, and they had no children living at her decease, then that the interest of *Mr. Cole* therein should cease and determine, and he then proceeded in these words:—"And I give and bequeath the said sum to such uses and to such person and persons as my said daughter shall, by deed or will, notwithstanding

Bequest (in effect) to *A.* for life, and in default of her appointment, equally amongst "her sisters, or their children, living at her decease." Held, first, that the children took by substitution, and therefore, that the children of a sister who was dead at the date of the will, could not take; and secondly, that such of the children as were entitled took "*per stirpes*."

Distinction between a gift to several, with remainder to their children, and one to several, with a substitutionary gift to their children, in respect to the children taking "*per stirpes*" or "*per capita*."

DATES.

1820. Lady Brooke died.
1820. Codicil.

| 1821. Testator died.
| 1851. Mrs. Cole died.

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ing coverture, direct or appoint; and, in default thereof, then equally to and amongst her sisters or their children living at her decease."

The testator died on the 12th of *March*, 1821. Mrs. *Cole* had no issue, she made no effective appointment, and died on the 3rd of *March*, 1851. She had five sisters; two of them had died without issue in infancy before the will of the testator; two others (Mrs. *Greenway* and Mrs. *Walker*) survived the testator, and died before Mrs. *Cole*, one of whom, Mrs. *Greenway*, had nine children, three of whom survived Mrs. *Cole*, viz. the Plaintiff Mrs. *Congreve*, and the Defendants *Ann* and *Charles Greenway*. The other sister, Mrs. *Walker*, had four children, one of whom only survived Mrs. *Cole*. The remaining sister of Mrs. *Cole* was Lady *Brooke*, who was dead at the date of the codicil, but left many children, two of whom were alive and were Defendants to this cause.

The first question was, whether the children of Lady *Brooke*, who was dead at the date of the codicil, were excluded taking under the bequest. The next question was, whether this sum of money was to be divided *per capita* or *per stirpes*; or, in other words, whether the Defendant *Henrietta Walker* was to take one-half of this sum, or whether it was to be divided equally between her and the two other Defendants *Ann* and *Charles Greenway*, and the Plaintiff Mrs. *Congreve*.

Mr. *R. Palmer* and Mr. *Metcalf*, for the Plaintiff.

Mr. *Roupell* and Mr. *Shee*, for the children of Mrs. *Greenway*.

Mr. *Elmsley* and Mr. *Little*, for the daughter of Mrs. *Walker*.

Mr. *...*

Mr. *Lloyd* and Mr. *De Gex*, for the children of Lady *Brooke*.

Mr. *Wright*, for trustees.

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Montagu v. Nucella (a); 2 *Jarman on Wills* (b); *Crooke v. De Vandes* (c); *Richardson v. Spraag* (d); *Tytherleigh v. Harbin* (e); *Waugh v. Waugh* (f); *Gray v. Garman* (g); *Gaskell v. Holmes* (h); *Bebb v. Beckwith* (i); *Clay v. Pennington* (k); *Horridge v. Ferguson* (l); *Christopherson v. Naylor* (m); *Coulthurst v. Carter* (n); *Bouverie v. Bouverie* (o); were cited.

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The question is, whether the gift to the children is by way of substitution, or whether the children are objects of a present gift?

If the gift to the children be substitutional, they cannot take unless their parents could have taken; but if the children be objects of a present gift, it is not necessary that their parents should have survived the testator. It has been suggested that the word "or" means "and," and that therefore the gift to the children is not by way of substitution. That variation of terms cannot be admitted, for here the word "or" has a distinct, clear and definite meaning. Here, there is no direct gift to the children, and being so, I am of opinion that the children take by substitution, and that the children of
Lady

(a) 1 *Russ.* 165.

(b) *Page* 667.

(c) 9 *Ves.* 197.

(d) 1 *P. Wms.* 434.

(e) 6 *Sim.* 329.

(f) 2 *My. & K.* 41.

(g) 2 *Hare*, 268.

(h) 3 *Hare*, 438.

(i) 2 *Beav.* 308.

(k) 7 *Sim.* 370.

(l) *Jacob*, 583.

(m) 1 *Mer.* 320.

(n) 15 *Beav.* 421.

(o) 2 *Phill.* 349.

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Lady *Brooke* (she being dead at the date of the codicil) are excluded from participating in the fund.

As to the second point,

Mr. *Roupell*, Mr. *R. Palmer*, Mr. *Metcalf* and Mr. *Shee*, argued that the children took *per capita*.

Mr. *Elmsley* and Mr. *Little*, contended they took *per stirpes*.

Thomas v. Hole(a); Lady *Lincoln v. Pelham* (b); *Smith v. Stratfield* (c); *Leigh v. Norbury* (d); *Blackler v. Webb* (e); *Sturgess v. Pearson* (f); *Abrey v. Newman* (g); *Butler v. Stratton* (h); *Browne v. Lord Kenyon* (i); *Belk v. Slack* (k); *Flinn v. Jenkins* (l); were cited.

The MASTER of the ROLLS reserved judgment on this point.

1853.
 Jan. 29.

The MASTER of the ROLLS.

This case is, in many respects, similar to the case of *Abrey v. Newman*, on which I have just expressed my opinion. But the distinction which exists in it, and which induces me, in this case, to come to an opposite conclusion to that at which I have arrived in the former case, is, that the gifts here are not in remainder, but are substitutionary. This is not a case, where, in a particular

(a) *Dick*. 50; *Forrest*. 251.
 (b) 10 *Ves*. 166.
 (c) 1 *Mer*. 358.
 (d) 13 *Ves*. 340.
 (e) 2 *P. Wms*. 383.
 (f) 4 *Mad*. 411.

(g) *Ante*, p. 431.
 (h) 3 *Bro. C. C*. 368.
 (i) 3 *Mad*. 410.
 (k) 1 *Keen*, 238.
 (l) 1 *Coll*. 365.

cular event, the money is to be divided between the children of Mrs. *Cole's* sisters, in which case they would take *per capita*, but where in a particular event the money is to be paid to the sisters of Mrs. *Cole*, or *their children then living*. It seems an improbable construction to say, that if one sister, having many children, had survived Mrs. *Cole*, and another sister had predeceased her, leaving many children, that either the surviving sister was to take the whole, to the exclusion of the children of the deceased sister, or that the sister and the nephews and nieces were to take equally, by which the share coming to the family of the surviving sister would be seriously diminished.

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I think that the testator meant equal benefits to each family, and that the true construction of this bequest is, that on the death of Mrs. *Cole*, the legacy was to be divided into as many portions as there were sisters, who were alive at the time of the codicil, and were either alive at Mrs. *Cole's* death, or had died leaving issue; that the surviving sister would take one of those shares, but that if a sister had died and left children, these children would take their parent's share.

This, also, is in accordance with the case of *Flinn v. Jenkins* (a), to which I was referred, and also to the case of *Arrow v. Mellish* (b), on which I have commented, in giving judgment in the last case.

I am of opinion, therefore, that in this case, the legacy is distributable *per stirpes*, and that one-half belongs to the Defendant *Henrietta Walker*, and that the remaining half is to be equally divided between the
 Plaintiff

(a) 1 Coll. 365.

(b) 1 De G. & S. 355.

1852.

Nov. 15, 16,
17, 18, 23, 24.

Feb. 8, 1853.

The SHREWSBURY and BIRMINGHAM Railway Company v. The LONDON and NORTH WESTERN Railway Company.

THIS cause, which, under different forms, has been frequently before the Court (a), now came on for hearing.

This bill was filed by the *Shrewsbury and Birmingham* Railway Company against the *London and North Western* Railway Company and the *Shropshire Union Railway and Canal* Company and two other Defendants, for the purpose of enforcing the due fulfilment, and obtaining the fruits of an agreement, entered into between the above-mentioned railway companies on the 12th October, 1847, under the corporate seals of the three companies, for the division of the traffic upon their competing lines.

Omitting many lines unnecessary for the elucidation

(a) Reported 2 *Hall & Tw.* *Macn. & G.* 70; 21 *L. J. (Q. B.)* 257; 2 *Macn. & G.* 324; 3 89.

Bruce, that it was a breach of trust, and by *L. J. Turner*, that it was *ultra vires*, and contrary to public policy.

An act authorized the *Shropshire Union* to lease several lines to the *North-Western*. The *Shrewsbury* entered into a contract with the *North-Western* to operate "during any such lease authorized to be granted by the said act." The *Master of the Rolls* held, that the contract had no operation until all the lines had been finished; but *L. J. Turner* differed in opinion.

A railway company cannot, in the absence of any authority contained in their acts of incorporation, become proprietors of steam-boats and carriers of passengers and goods by sea.

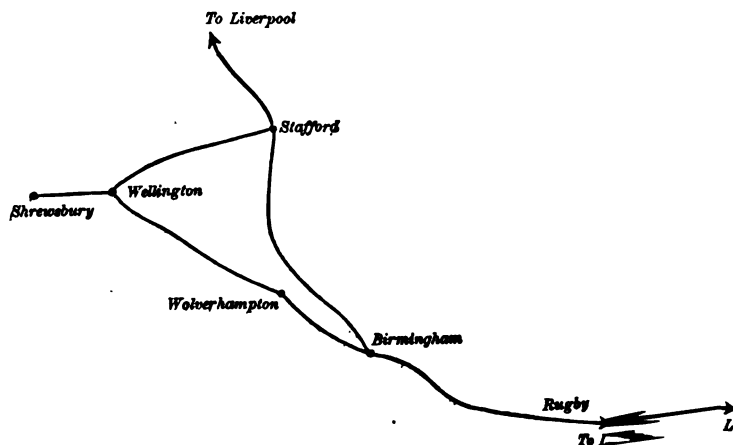
The Court looks with great disfavour on an objection of illegality of a contract, urged by a party to avoid its performance after he has received the consideration for it.

During a contest before Parliament, two competing railway companies came to an agreement for dividing the profits earned by both, in a given proportion, and for regulating the traffic. Lord *Cottenham* and the Q. B. held, that the arrangement was not invalid, as a fraud upon the public by creating a monopoly, and the *Master of the Rolls* considered that Lord *Cottenham* had decided inferentially, that such a contract was not *ultra vires*. But, held by *L. J. Knight*

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of the principle decided, the following diagram will sufficiently explain the relative position of the companies.



The *North Western* passes from *London* to *Liverpool* through *Rugby*, *Birmingham*, and *Stafford*, and the same Company had a lease of the *Stour Valley* line being the portion from *Birmingham* to *Wolverhampton*. The Plaintiff's line (the *Shrewsbury*) passed from *Shrewsbury* through *Wellington* to *Wolverhampton*. The *Shropshire Union* passed from *Shrewsbury* through *Wellington* to *Stafford*, and it had three other lines and canals which it is not necessary to notice. The portion between *Shrewsbury* and *Wellington* was common to the two latter companies, and was worked by a joint committee.

In 1847, the *London and North Western Railway Company* and the *Shropshire Union* solicited a bill in Parliament, to authorize the *London and North Western Railway Company* to take a lease of the undertakings of the *Shropshire Union*, comprising that from *Shrewsbury* to *Stafford*. The effect of their succeeding in this application to Parliament is obvious. By obtaining the line from

from *Wellington* to *Stafford*, the *North Western* would have the control of the whole traffic between *Shrewsbury* and *London* by the circuitous route through *Stafford*, to the exclusion of the direct route through *Wolverhampton*, and it would obtain other similar advantages, which it is unnecessary to refer to. The Plaintiffs, therefore, naturally opposed the bill; and to induce them to withdraw their opposition, an agreement, signed by the Defendants, was entered into, and acted upon in *May*, 1847.

In consequence of the withdrawal of this opposition, an act passed on the 2nd *July*, 1847, authorizing a lease of the undertaking of the *Shropshire Union* to the *London and North Western Railway Company*. The formal instrument under the corporate seals of the companies was afterwards prepared, and was executed on the 12th *October*, 1847.

By the first clause of this agreement, the three railway companies covenanted, "during the continuance of any such lease authorized to be granted by the said act," to keep an account of the traffic from *Shrewsbury* and *Wellington* to *Rugby*, or any place to the south; and of the monies received from that source.

By the second, they undertook to furnish each other with half-yearly accounts of these matters; and the monies received in respect of the distance between *Shrewsbury* and *Stafford*, and *Shrewsbury* and *Wolverhampton*, were to be ascertained and divided, and seven-thirteenths paid to the Plaintiffs and six-thirteenths to the Defendants.

By the third, the Defendants undertook, "during the continuance of any such lease," not to convey anything from *Shrewsbury* or *Wellington*, or from any point between those two places, to any point or place on the line of the Plaintiffs' railway or the *Birmingham and Stour Valley*

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Valley Railway, nor to use the line by *Gnosal* and *Stafford* "to compete for any traffic which properly belonged to the *Shrewsbury* and *Birmingham* Railway Company."

By the fourth clause, it was stipulated, that the contract should not be evaded by any "arrangement, scheme, device or contrivance," and that questions arising upon it should be referred to the arbitration of *Robert Stephenson*, or in case of his death or absence, to the arbitration of an umpire to be appointed by the railway commissioners.

By the fifth clause, the Plaintiffs were to have liberty to determine the agreement, by giving six calendar months' notice in writing of their intention so to do.

The Plaintiffs' line of railway was opened on the 13th *November*, 1849, and they applied to the Defendants, the railway companies, to keep the accounts above specified, and to deliver abstracts thereof. This was not done; and in the month of *December* following, the Plaintiffs filed their bill in this cause, praying that the Defendants, the railway companies, might be decreed to perform the matters specified in the contract. The prayer of the bill, in this respect, closely followed the words of the agreement, and prayed likewise for an injunction to restrain the Defendants from carrying passengers, cattle, goods, or other matters or things from *Shrewsbury* or *Wellington*, or from any point between those places, to any point or place in the line of the Plaintiffs or the *Stour Valley* Railway; and from using the line by *Gnosal* and *Stafford* to compete for any traffic which belonged to the Plaintiffs.

A demurrer was put in to this bill by the Defendants which was argued before the late Vice-Chancellor of England early in 1850, and was allowed by him. This

was carried by appeal to Lord *Cottenham*, who reversed that decision, and granted an injunction till answer or further order (a). On the answer being put in, an application was made, in *December*, 1850, to the Lord-Chancellor *Truro*, to discharge that injunction (b). His lordship thought, that the propriety of granting an injunction could not be determined, till various legal questions, on which the Plaintiffs' equity mainly depended, had been determined at law. He therefore discharged the injunction granted by Lord *Cottenham*, and gave liberty to the Plaintiffs to bring such action as they might be advised, the Plaintiffs and Defendants mutually undertaking to keep all the required accounts of traffic. The action was brought accordingly, and upon the determination of that action by the judgment of the Queen's Bench in *November*, 1851 (c), the motion for an injunction was renewed before the Master of the Rolls in the early part of last year; when the motion, by arrangement, stood over till the hearing of the cause.

It is necessary to add, that no lease appeared ever to have been granted by the *Shropshire Union*, whose lines, except that from *Shrewsbury* to *Stafford*, had never been completed.

The Defendants filed a cross bill to bring before the Court certain arrangements entered into by the Plaintiffs since the filing of the original bill, and which, they contended, formed a just defence to this suit.

Mr. *Rolt*, Mr. *Hardy*, and Mr. *Giffard*, for the Plaintiffs, insisted, that the validity of the contract had been finally determined by the decisions of Lord *Cottenham* and the Court of Queen's Bench. That the contract had

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(b) 3 *Macn. & G.* 70.
(c) 21 *L.J. (Q. B.)* 89.

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had come into operation, although a lease had not been actually granted; for this Court would regard as done, that which had been agreed to be done, and would not allow a party to set up his own default, as a defence to the performance of his part of a contract. That it was neither seemly nor equitable for a large public company to retain the consideration and repudiate the contract for which it had been paid.

Mr. *Bethell*, Mr. *Follett*, and Mr. *Prior*, for the *London and North Western* Company, argued, that Lord *Cottenham's* decision was not conclusive, for Lord *Truro* had afterwards dissolved the injunction, and that the points of law had not all been determined by the decision of the Queen's Bench. That the agreement was illegal, being a fraud on Parliament, and opposed to public policy as tending to a monopoly, and the destruction of that open competition, and that full benefit of the railroads to the public, which it had always been the object of the legislature to secure. Secondly, that it was beyond the powers of the directors to enter into such a contract, which was in the nature of a partnership between two railway companies; and that their acts did not empower them to do so, and involving, as it did, a breach of trust as against the shareholders, that this Court could not enforce the agreement. Thirdly, that the agreement had not yet come into operation; for according to the true construction of the contract and the acts, it was not to come into effect until *all* the lines had been completed, and "a lease" of the whole undertaking actually granted. Fourthly, that the conduct of the Plaintiffs, and the engagements entered into by them subsequent to the filing of the bill, rendered it inequitable to enforce the agreement.

Mr. *Willcock* and Mr. *Chapman*, for the *Shropshire Union* Company.

Mr.

Mr. *R. Palmer* and Mr. *James*, for the chairman of the *North Western* Company.

Mr. *Rolt*, in reply.

The following cases were cited: The *East Anglian* Railways Company v. *Eastern Counties* Railway Company (a); *Gage* v. The *Newmarket* Railway Company (b); *Natusch* v. *Irving* (c); *Colman* v. *Eastern Counties* Railway Company (d); *Bagshaw* v. *Eastern Union* Railway Company (e); *Cohen* v. *Wilkinson* (f); *Hawkes* v. *Eastern Counties* Railway Company (g); *Edwards* v. *Grand Junction* Railway Company (h); The *Great Northern* Railway Company v. *Eastern Counties* Railway Company (i); *Beman* v. *Rufford* (k); *Bainbrigg* v. *Baddeley* (l); *Croome* v. *Lediard* (m); *Squire* v. *Campbell* (n); *Sutton's* Hospital Case (o); *Mac Gregor* v. *Dover and Deal* Railway Company (p); 8 & 9 Vict. c. 18, s. 87.

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The MASTER of the ROLLS reserved his judgment.

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The case of the Plaintiffs is, that the Defendants have entered into an agreement which they have violated, and that they ought to be restrained from so doing. The Defendants, on the other hand, contend, that the agreement is void in law, as being both contrary to public policy, and also as being beyond the powers which

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| (a) 11 C. B. Rep. 775. | (i) 9 Hare, 306. |
| (b) 21 L. J. (Q. B.) 398. | (k) 1 Sim. (N. S.) 550. |
| (c) <i>Gow on Partnership</i> , 407. | (l) 3 Macn. & Gor. 413, and |
| (d) 10 Beav. 1. | 13 Beav. 355. |
| (e) 2 H. & Tw. 201. | (m) 2 Myl. & K. 251. |
| (f) 12 Beav. 125, 138. | (n) 1 Myl. & Cr. 459. |
| (g) 1 De G. M. & Gor. 737. | (o) 10 Coke, 1 a. |
| (h) 1 Myl. & Cr. 650; 7 Sim. 337. | (p) 22 L. J. (Q. B.) 69. |

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which the companies possess under their acts of incorporation; and if they fail in this, they contend, that the period when the agreement is to come into operation has not yet arrived, and that it cannot do so until an actual lease shall have been granted of all the lines of railway mentioned in the act which is referred to in the agreement; and, lastly, they contend, that the acts complained of by the Plaintiffs are not any violation of the contract entered into. The Plaintiffs contend, that all these questions have, in truth, been determined in their favour in this cause, by Lord *Cottenham*, and that so far as the Court of Law has come to any decision upon these questions, it has confirmed the decision of Lord *Cottenham*.

The Defendants contend, that Lord *Cottenham's* decision, which was before the answer was put in, is not conclusive on these points; that the Court must be governed by the decision of Lord *Truro*, who dissolved the injunction; and that the questions which Lord *Truro* wished to have determined at law, have not, in fact, been so determined, by reason of the form adopted and the course pursued at law, and that consequently, this Court ought to direct the Plaintiffs to complete their proceedings at law, in order that the questions still remaining between the Plaintiffs and Defendants may be submitted to the decision of the Court of Common Law, in the regular manner, and that in the mean time, this cause ought to be directed to stand over. I am not, however, disposed to adopt the course thus urged upon me. Upon a full consideration of the matter, I have thought it better for the parties themselves, and more consistent with the duties imposed upon the Court, especially since the late statute (*a*), to endeavour, myself,

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(a) 15 & 16 Vict. c. 86, ss. 61, 62.

to come to the best conclusion I could on the questions at issue, and that by these means these questions probably would, at an earlier period, come to be decided by the highest tribunal, with such assistance as they might think fit to require, than if I sent the questions to be tried, on the remaining issues not disposed of by the judgment on the demurrer at law.

In determining therefore myself the points before me, I have, in the course of doing so, to examine how far I am or ought to consider myself bound by what has already been decided respecting them, and whether that decision is to be treated as final; or if not, what the points are which remain to be finally determined between the parties. The fact of the agreement having been executed is admitted; the fact that it was entered into in consideration of the Plaintiffs having withdrawn their opposition to the bill solicited by the Defendants in Parliament is also admitted. There was, therefore, a sufficient consideration to support it, and unless there be some valid objection to the agreement itself, or unless the time for its coming into operation has not arrived, that agreement must be enforced, and the Defendants restrained from doing any acts in violation of it; and in the determination of which last question, the Court will look at the substance and not the form, for the purpose of ascertaining whether the acts done, though not in terms, are not, in substance, violations of the agreement.

The first question, therefore, is, whether the agreement is a valid or an invalid agreement. The main grounds on which the Defendants urged that the agreement was invalid were, first, that it was injurious to and therefore a fraud upon the public, by creating a monopoly; and secondly, that it was not within the scope of the acts

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of Parliament incorporating these railways, that one of them should enter into a partnership, as it were, with another railway company, for the purpose of dividing the profits earned by them in any undertaking.

The first ground of invalidity has been overruled by the decision of Lord *Cottenham*, and by that of the Court of Queen's Bench. The second ground of invalidity is not entered into very fully by the Lord Chancellor, in his reported judgment, and does not appear to me to be mentioned in the judgment delivered at law. It must, however, be considered to have been inferentially decided by both these tribunals, in deciding that the agreement was valid and legal. And assuming that this species of partnership was not within the scope of the earlier acts, yet if it be expressly authorized by the later one, "it might be difficult to contend successfully (to employ the expressions used by Lord *Cottenham*), that the later act was a breach of the contract entered into with the parliament which framed the earlier acts, and that consequently it could not acquire force and validity." It is no doubt certain, for instance, that a railway company cannot, in the absence of any authority contained in their act of incorporation, become proprietors of steam boats and carriers of passengers and goods by sea; but if Parliament, aware of this fact, think fit to pass a subsequent act, authorizing the railway company so to do, it would be too much to contend that this act cannot have force or validity because it is directly inconsistent with the powers and duties conferred upon the company by their act of incorporation. Finding, therefore, that this question of the invalidity of the agreement has, in truth, been decided in favour of the Plaintiffs, both at law and in equity, and that no Judge, in the course of these proceedings, has expressed any doubt on this point, it would be impossible for me, even
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if I entertained graver doubts on the subject than I am disposed to do, to act in defiance of these opinions of the Lord Chancellor and the Queen's Bench, or to refuse the Plaintiffs relief, on any grounds connected with the validity or illegality of the agreement. In addition to which, I fully concur in the sentiment, stated at the bar to have been expressed by Lord *St. Leonards*, in *Hobbes v. The Eastern Counties Railway Company*, to the effect, that the Court looks with great disfavour on the objection of illegality of a contract urged by a party to that contract, in order to avoid the performance of acts which he has stipulated to do, and for which he has received the consideration he had contracted for.

The next question, however, stands on very different grounds; it is this, whether the agreement is to come into effect before a lease is granted, in accordance with the power and authority for that purpose contained in the act of 10 & 11 *Vict. c. cxxi.* On this point, with reference to the question of how far it is settled by decision in this cause, I think it is material to refer, once more, to the history of the proceedings in this cause. The Vice-Chancellor of England was of opinion, that the time for granting the lease had not yet arisen, and that accordingly, the time for the agreement to come into operation had not yet arrived, and on that ground, allowed the demurrer of the Defendants. Lord *Cottenham*, on appeal, in overruling the demurrer, dissented from that view of the case, and was of opinion, that the lease, or the relation of landlord and tenant, was to come into operation, on each railway as it was completed, and on being asked to grant a case for the opinion of a Court of Law, generally, on the construction of the agreement, stated, that the time for doing so would be at the hearing of the cause.

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On the motion to dissolve the injunction after the answer was filed, Lord *Truro* sent the whole question of the construction of the contract and statute to the consideration of a Court of Law, by directing the Plaintiffs to bring an action at law. It is clear, therefore, that Lord *Truro* considered, that Lord *Cottenham's* judgment was not conclusive on this subject, but that it ought properly to undergo further discussion, before the Court of Chancery could properly decide it, and this was not contrary to Lord *Cottenham's* view, who could not, with propriety, on demurrer, have adopted the course taken by Lord *Truro*.

I consider, therefore, that the decisions of the Lord Chancellors leave this question to be decided, subsequently, by the Court before which it might properly come. How far this question has been determined at law is a matter of contest, and does not appear to me to be very plain. It has been decided, undoubtedly, that in the absence of a lease, the agreement had not come into operation; but whether if a lease were now granted of that part of the line, from *Shrewsbury* to *Stafford*, it would be a lease in pursuance with the authority contained in the act, I do not find to be decided; and as I cannot, after Lord *Truro's* decision, treat it as settled by Lord *Cottenham*, I must either decide that question myself, or put it into such a course of proceeding, that it may receive a proper decision. Consistently with the provisions of the late statute, which forbid my sending a case for the opinion of a Court of Law, I have not seen my way to obtaining a satisfactory decision upon it, by any course of legal proceeding. Besides this, there are certain equitable considerations which arise, and could not be disposed of by the decision of a Court of Law; I have, therefore, for these reasons, and  
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those which I have already stated, thought it incumbent on me to determine this question myself.

Before considering this question in detail, I think it right to distinguish between what may be termed the legal and the equitable view of this question. The fact no lease having been granted, is admitted to have been conclusive in Courts of Common Law against the plaintiffs, but it is contended, that in equity, the mere circumstance that an indenture of demise has been or has not been executed, will not be material; that equity regards that as done which ought to be done, and regulates the rights and liabilities of the parties, exactly in the same manner as if the documents, giving what is called, technically, legal effect to them, had been executed.

This principle is not, in truth, disputed, on the other side; but it is contended, that it is inapplicable to the present case, for that, according to the true construction of the agreement, that instrument was neither expressed nor intended to be operative, until a lease was granted in accordance with the statute, and that under the provisions of that statute, not only has no lease been granted, but that no lease could be granted; and that if the indenture of demise were now prepared and executed by the two companies, it would be a mere void instrument, for that the time when the statute authorizes the lease has not yet arrived. I am of opinion, that this is the point into which this question resolves itself. If, according to the provisions of the statute, a lease might be granted of that portion of the undertaking which is now actually completed and open to traffic; or if, according to the provisions of that act, the *London and North-Western Railway Company* are to be treated as the actual lessees of that portion of the undertaking, although

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although no such lease has been granted, then I am of opinion, that the time for the agreement coming into operation has actually arrived. It depends, therefore, partly on the contract, and partly upon the effect to be given to the provisions of the act of Parliament, the construction of which must be the same both at law and in equity. The first question is, the effect of the agreement of the 12th of *October*, 1847. It is made between the Plaintiffs of the one part, and the Defendants, the railway companies, of the other part. It recites, that the railway between *Shrewsbury* and *Wellington* is common to the Plaintiffs and the *Shropshire Union*; it then recites, that a bill was introduced to authorize a lease of the *Shropshire Union* to the *London and North-Western* Railway Company, and that it was opposed by the Plaintiffs. The third recital is in these words:—  
 “Whereas the *London and Birmingham* Railway Company agreed to withdraw their opposition to the said bill, on its being mutually arranged and agreed, between the said companies, that the covenants and agreements hereinafter contained should be mutually entered into by them, or an act of Parliament, being obtained for authorizing such lease as aforesaid” (i. e. a lease in perpetuity of the undertaking of the *Shropshire Union* Railways and Canal Company, to the *London and North-Western* Railway Company), “or a lease between the same parties, of any part of the said undertaking between *Shrewsbury* and *Stafford*; and whereas such act was obtained during the last session of Parliament.”

Then comes the first clause of the agreement, which is to take effect “from time to time and at all times hereafter, during the continuance of any such lease authorized to be granted by such act;” that is, during the continuance of any lease, either of the whole undertaking, or a lease of any part of the undertaking  
 between

**between** *Shrewsbury* and *Stafford*; provided only, that **it** shall be a lease which is authorized to be granted by **such** act. The third clause is, that during the continu-  
**ance** of any such lease as aforesaid, the Defendants will **not** carry passengers or goods within the prohibited  
**poi**nts or compete for traffic belonging to the Plaintiffs. **It** is, therefore, in my opinion, plain, that according to  
**these** articles of agreement, it is to have effect during  
**the** continuance of any lease authorized to be granted  
**by** the act, whether the lease so authorized be of the  
**whole** or only of such part as before mentioned.

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**T**o determine this I turn to the act. There is no  
**que**stion but that the act authorizes a lease of the whole  
**und**ertaking; the question is, whether, in the events  
**wh**ich have occurred, and in the present state and cir-  
**cum**stances of the railways and the parties, as these  
**mat**ters appear in evidence before me, the act authorizes  
**a** lease of a part of the undertaking, viz. of that part  
**wh**ich constitutes the line from *Shrewsbury* to *Stafford*.

**A**fter carefully considering the provisions of the sta-  
**tute**, with a view to this subject, and weighing the argu-  
**ments** of Counsel and the judgment of Lord *Cottenham*  
**on** the subject, I have come to the conclusion, that a  
**lease** of that part of the undertaking between *Shrews-*  
**bury** and *Stafford*, which is completed, is not authorized  
**by** any of the provisions of the leasing act. In the  
**first** place, there is only one clause that authorizes any  
**lease** to be granted: that clause is the first; it recites  
**the** various works which constitutes the undertaking of  
**the** *Shropshire Union* Railways and Canal Company,  
**and** it then empowers and requires the *Shropshire Union*  
**Railways** and Canal Company to grant, and it empowers  
**and** requires the *London and North-Western* Railway  
**Company** to accept, a lease, in perpetuity, of the under-  
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taking. Not a word is here said of any authority or power to grant a lease of any *portion* of that undertaking. If it stood on this clause alone, no doubt or question could, in my opinion, be raised upon it. There are no words, from whence it could be successfully argued, that the *Shropshire Union* had a power to lease a part only of the undertaking. On looking through the rest of the act, I am unable to find any clause which, in express terms, authorizes the granting of a lease of a part only of the undertaking. If, therefore, such a power is to be found in the act, it must be by implication or necessary inference, to be drawn from the provisions contained in the other clauses, and from the general scope and purpose of the act.

The next nine sections do not appear to me to have any bearing on this point. The first section relied on for this purpose is the eleventh, which enacts, that when a portion of the undertaking is completed, the *London* and *North Western* Railway Company are to be put into complete possession of that portion for the purpose of working it; and the nineteenth section, which is the next relied upon, provides, that the *London* and *North Western* Railway Company shall pay, for the portion so completed and into possession of which they have been placed, a rent, bearing the same proportion to the whole rent to be paid, as the capital expended in the formation of that portion of the line bears to the capital required to be employed for the whole undertaking, that is, half the rate per cent. of the dividend paid on the shares of the *London* and *North Western* Railway Company, and so from time to time, as each part of the undertaking is completed. The section is in these words. [*His Honor here read it.*]

The construction of these clauses appears to me to  
 be

plain; it is, that when the whole undertaking is completed, the lease of the whole shall be granted to the *London and North Western Railway Company*, at a rent, which shall be equal to a dividend on all the capital raised and expended in the formation of the undertaking, of half the amount of the rate per cent. of the dividend paid on *London and North Western Railway* shares, but as each portion of the undertaking is completed, the *London and North Western* shall be put into possession of such portion, and shall pay a proportional rent for that portion, according to the rate above stipulated.

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This certainly does not amount to or constitute a lease, or any authority to grant a lease, either at law or in equity. And it is always to be borne in mind, in considering this question, that no power of granting or accepting a lease is to be found, in the original acts incorporating these railway companies, and that, therefore, no valid lease could be granted or accepted by the companies, except such as was authorized by this statute. I have read through the rest of this statute, to see whether, from any of the other clauses, any such authority could be inferred, but I have not been able to find any. The twelfth section has no bearing on the question; the thirteenth section directs the *London and North Western Railway Company* to keep separate accounts of the undertaking thereby authorized to be leased, or so much thereof as shall, from time to time, be under the power of the *London and North Western Railway Company* by virtue of that act; thereby drawing a clear distinction between the lease which was to comprise the whole, and the possession of the *London and North Western Railway Company* which might be of part.

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The fourteenth section has no bearing on the point. It speaks of the railways authorized to be leased, but contains nothing from whence a separate lease of this is to be inferred. The fifteenth section draws the same distinction as the thirteenth. The sixteenth section speaks of the undertaking authorized to be leased, as if it were one thing.

The seventeenth and eighteenth have no bearing on the question. The twentieth, twenty-first, twenty-second and twenty-third sections are also silent on this point. The twenty-fourth speaks of the lease of the said Railways thereby authorized, as if only one lease existed thereof. The twenty-fifth speaks "of the lease hereby authorized to be made, and notwithstanding such lease," as being clearly a lease of the whole undertaking. The twenty-sixth section is different. This section distinctly speaks of leases in the plural. The clause is to this effect. [*His Honor read it.*]

I am unable to explain why the word is here in the plural, but I find no passage in the statute which authorizes more than one lease, and no other passage which speaks of more than one lease, either directly or inferentially. It would therefore, in my opinion, be too violent a construction to infer, from this word being in the plural, that a lease was to be granted of each railway as it was completed. The twenty-seventh, twenty-eighth, twenty-ninth and thirtieth clauses have no bearing on the question either way. The thirty-first is important, and is, in my opinion, decisive against the construction which the Plaintiffs seek to place on this act. It is to this effect. [*His Honor read it.*] This section, therefore, positively prohibits the *Shropshire Union* Company from granting, and the *London and North Western* Railway Company from accepting, a lease

se of the undertaking, unless it shall have been  
ved, that one-half of the whole amount of capital  
the whole undertaking has been, not merely paid,  
t actually expended for the purposes of the under-  
ing.

Courts of Justice have, in the construction they have  
t on acts of Parliament, taken great liberty with the  
pressions contained in them, and virtually, in many  
es, have, by degrees, overruled what probably was  
e intention of the legislature; but such violence upon  
act of Parliament I never met with, in any case, as  
say, that when Parliament authorizes a lease to be  
anted, which could not be granted without that au-  
ority, and imposes as a condition, that before the lease  
granted, a particular sum of money shall be subscribed  
d spent in a particular manner, that is a condition  
ich may be wholly disregarded, and that not only a  
ase may be made without that being done, but fur-  
er, that a lease may be made of a portion of it, upon  
proportional part of that sum being subscribed and  
pended. The remaining clauses of the act, from the  
irty-second to the thirty-ninth, both inclusive, do not  
fect the question under consideration.

What I have to consider is, whether in the state of  
ings, and under the provisions of the act which I have  
ferred to, in detail, a lease might be granted of the  
ortion of the undertaking which is completed, or, what  
the same thing, whether the *Shropshire Union Com-*  
*any* could compel the *London and North Western*  
*Railway Company* to accept such a lease, or whether  
the *London and North Western Railway Company* could  
compel the *Shropshire Union Company* to grant such a  
lease? and I am of opinion, that neither Company, how-  
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ever desirous to do so, could have enforced such a lease being either accepted or granted.

It was urged by Counsel, that the act authorized a lease of the railway from *Shrewsbury* to *Stafford*, and that this was sufficient, and that it was not material that it also authorized two other leases. This argument, if adopted, would, in my opinion, simply overrule the act of Parliament, which authorizes one lease and one lease only; and although on the completion of each line, it authorizes the *London* and *North Western* Railway Company to take possession of that line and to work it, it no where authorizes a lease of that portion, but, on the contrary, prohibits any lease, until a condition has been performed, which still remains incomplete. I am therefore of opinion, that such a lease as is authorized by the act has not been made, and cannot as yet be made.

It is however argued by the Counsel for the Plaintiffs, that even if this be the correct construction, the Plaintiffs are entitled to relief on this ground, that the Court is, first, to consider, what the thing was which was referred to in the agreement as the subject of the lease. Secondly, to consider, whether the Defendants have not got that, which, in equity, is equivalent to a demise of that very thing which is referred to in the agreement, as the subject of the demise; that the thing referred to as the subject of the lease was these various railways and the canal, and that the Defendants have, under the act of parliament, got possession of the one railway completed, as fully and as completely, as if they had a lease of that portion of it, and that in equity, they must be treated as if they were lessees in possession. The answer to this appears to me to be clear and decisive:—The question is not what the powers of the Defendants  
over

er the railways may be, but what is the construction the contract they have entered into. It seems to me at they have agreed to do and to abstain from doing certain acts, during the continuance of a lease authorized by the act of Parliament. The agreement is clear and precise, that it is to be operative during the lease authorized to be made by act of Parliament. I am of opinion, that a lease authorized by the act of Parliament is not now in existence, and cannot be granted at present.

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If I were to decide, that the Defendants have got something which is as good as a lease, and therefore, that the agreement takes effect, I should be introducing a new term into the agreement, and in truth, substituting a new agreement for that which the parties have entered into. Nothing would have been more simple and easy than to have expressed the intention of the parties, that intention existed, that the agreement should take effect *pro tanto*, as to each portion of the undertaking, when completed, as soon as the Defendants, the *London and North Western* Railway Company, were put into possession of that portion of the undertaking, but this in truth, omitted altogether from the agreement.

And it is, on this principle alone, that I am able to explain the decision of the Court of Queen's Bench, that the agreement has not come into effect, because the lease has not been made. The agreement must have the same construction at law as in equity; and if the true construction of the agreement be, that acts authorized to be done by the *London and North Western* Railway Company are to be done, not only when a lease is granted, but also before a lease can be granted, as soon as the *London and North Western* Railway Company have possession of any portion of the line, I am unable



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unable to understand, why the non-execution of a lease could be fatal to the claim of the Plaintiffs even at law.

The result of my opinion therefore, is, that the time when the agreement is to come into operation has yet arrived, and I am of opinion, as I before stated, that notwithstanding Lord *Cottenham* seems to have come to an opposite conclusion, on the facts as they appeared before him on demurrer, I am bound, at this hearing, to decide this case on the materials before me, according to the best of my judgment, giving the fullest weight to the opinion of that eminent Judge. Having arrived at this opinion, it becomes unnecessary to consider whether the acts done by the Defendants are in violation of the agreement which is not yet in operation.

I am of opinion, therefore, that the case of the Plaintiffs fails, and that the bill must be dismissed.

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NOTE.—On appeal to the Lords Justices, L. J. *Knight Bruce* held, that the contract entered into by the Directors, who were trustees for the shareholders, was a breach of trust, the performance of which this Court would not enforce. L. J. *Turner* differed in opinion from the Master of the Rolls, as to the construction of the agreement, his Lordship holding, that the agreement had come into operation, inasmuch as a lease of any one of the *Shropshire Union* lines, when completed and opened, might, consistently with the act of parliament, be granted. But he held, that the agreement in question exceeded the powers conferred on the companies by their acts of incorporation, and was therefore contrary to public policy and could not be enforced here. (28th June, 1853.) 3 *De G. M. & Gor.* and 7 *Railw. Ca.* 531.

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Jan. 29.

Feb. 9.

**B**Y a settlement, dated the 22nd *June*, 1822, and made in contemplation of a marriage between Miss *Frances Redwood* (who was then under age) and Mr. *William A. Blake*, a sum of 711*l.* belonging to Miss *Redwood*, was settled on the usual trusts. The indenture contained the following covenant:—That “in case, at any time or times hereafter, during the said coverture, any real or personal estate and effects, of what nature or kind soever, shall descend, come to, or vest in the said *Frances Redwood*, either by will or otherwise, or the said *Wm. Adams Blake* in her right, at law or in equity, the said sum of 711*l.* and all such other monies, estate and effects, so descending, coming to or becoming vested in the said *Frances Redwood*, as aforesaid, shall be conveyed, assigned, and assured, respectively, from time to time, without any delay, by the said *William A. Blake*, his heirs, executors or administrators, and the said *Frances Redwood*, his intended wife,” to the trustees, upon the trusts, &c.

A covenant in a marriage settlement, that in case, at any time “thereafter” during the coverture, any real or personal estate should “descend, come to or vest in” the wife (who was then an infant), it should be settled, held to include the proceeds of real estate taken by a public company, to which the wife, at the execution of the settlement, was entitled in remainder.

Under a decree of this Court, made on the 8th of *November*, 1852, Mrs. *Blake* was declared to be the heiress at law of Mrs. *Betts* (formerly *Anna Maria Prince*), who died without issue on the 8th of *June*, 1822, fourteen days before the date of the above stated indenture. As such heiress, Mrs. *Blake* was entitled to a considerable sum standing in Court under the following circumstances:—On the marriage of *Anna Maria Prince* with *John Betts* in 1782, certain freehold premises were settled

Effect of an agreement, on the marriage of a female infant, to settle her real estate. It would be a fraud upon the husband's contract, if he were to consent to a disposition of the estate by his wife, calculated to defeat the settlement.

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to the use of *A. M. Prince* for life, remainder to *John Betts*, for life, remainder to the children of the marriage, remainder, in default of children, to the right heirs of *A. M. Prince*. Part of these lands were taken by the *London Dock Company*, under the powers of their acts, and the purchase money was paid into Court upon the trusts of the settlement of 1782.

*John Betts*, the tenant for life under the settlement survived his wife, and died in *February*, 1841. After his death, a question arose, as to who was the heir *ex parte paternâ* of *A. M. Betts*, which was ultimately determined in favour of *Mrs. Blake (a)*. A petition was now presented by *Mr. and Mrs. Blake*, for payment out of Court of the money to *Mrs. Blake*, or to her husband with her consent; whereupon, a question arose, whether the money ought not to be paid to the trustees of *Mrs. Blake's* marriage settlement, as included in the covenant to settle after acquired property. The question depended on the construction of the covenant contained in the settlement, and on the effect of *Mrs. Blake* having been under age at the date of its execution.

*Mr. Swanston* and *Mr. Haddan*, for *Mr. and Mrs. Blake*, in support of the petition, contended, that the property in question was not included in the settlement, inasmuch as it neither descended to nor became vested in *Mrs. Blake*, "at any time or times thereafter" (that is, after the 22nd of *June*, 1822), during the coverture, but, on the contrary, had become vested in her, by virtue of the indenture of 1782, on the death of *Mrs. Betts*, on the 8th of *June*, 1822, and previously to the execution

(a) See *In re The London Dock Company*, 11 *Beav.* 78; and *ante*, p. 188, note; *Hyde Edwards*, 12 *Beav.* 160, 253.

of the settlement of the 22nd of June, 1822. They argued, that the other words, "come to," were analogous to or synonymous with the words "descended" and "become vested," *Hoare v. Hornby* (a); *Otter v. Melville* (b). Secondly, that the fund in Court represented the real estate taken by the company, and must be treated, for all purposes, as realty. That such real estate had never "descended, come to or vested in" the husband, who was neither bound nor able to settle it according to the covenant, as that could only be done voluntarily, by the wife (3 & 4 Will. 4, c. 74) (c), with his consent (d), and that the covenant was not binding upon the wife, because she was an infant at the time of the execution of the settlement, *Milner v. Lord Harewood* (e), and therefore incapable of entering into any covenant binding either herself or her estate.

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Mr. Willcock and Mr. Karlake, for the trustees of the settlement, *contra*. First, the words "come to" are equivalent to "succeed to the possession of," and the expression "vested" means vested in possession, and not vested in interest; *Graftley v. Humpage* (f); *James v. Durant* (g). The distinction between vesting in interest and vesting in possession is explained in *Fearne's Cont. Rem.* (h). Secondly, the fund is to be treated as personal estate, and ought to be paid to the trustees, and held by them on the trusts of the settlement; but, thirdly, even if it should be treated as real estate, still the husband is bound to perform his covenant, and the wife also is bound by her election to take it as money. They also cited *Blythe v. Granville* (i).

Mr.

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|--------------------------------------------------------------|------------------|
| (a) 2 Y. & C. C. 121.                                        | (e) 18 Ves. 259. |
| (b) 2 De Gex & Sm. 257.                                      | (f) 1 Beav. 46.  |
| (c) Sect. 80; and see <i>Jordan v. Jones</i> , 2 Phill. 170. | (g) 2 Beav. 177. |
| (d) Sect. 77.                                                | (h) Page 263.    |
|                                                              | (i) 13 Sim. 190. |

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Mr. *Swanston*, in reply. The settlement has no application, except as to property under a prospective title; and as to real estate, the settlement is wholly inoperative as regards an infant.

*The MASTER of the ROLLS.*

I will consider this case.

Feb. 9.

*The MASTER of the ROLLS.*

In this case, an application is made for the payment, to the Petitioners, of a considerable sum of money standing in Court, which is the produce of certain land, taken, under the acts establishing the *London Docks*, for the formation of those works. The land taken stood limited to the use of a lady of the name of *Betts*, for life, with remainder to her husband for life, with remainder to her children, and in default of children, to her right heirs.

This lady died without issue, on the 8th of *June*, 1822. Her husband survived her many years, and died in *February*, 1841.

Upon his death, petitions were presented and proceedings of considerable complication took place, for the purpose of ascertaining who was the heir of *A. M. Betts*. The final petitions for this purpose were heard by me shortly before the Long Vacation in last year; and early in *Michaelmas* Term I decided, that Mrs. *Blake* had established, that she was the heir *ex parte paternâ* of *A. M. Betts*. In accordance with that decision, an application is now made for payment of the sum of money out of Court. If my decision should stand unreversed, there is no doubt but that Mrs. *Blake* or her trustees

trustees are entitled to the money; and the question which now arises is, simply, whether the money is to be paid to her or to her husband on her consent, or whether it ought to be paid to the trustees of her marriage settlement. On this point, I thought that a question of some difficulty arose, and desired, that the trustees of that settlement might appear to argue the point on the part of the *cestui que trust*; Mr. *Willcock* and Mr. *Karslake* have, accordingly, appeared for this purpose, and have afforded the Court much assistance in coming to a conclusion on this point.

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The question, whether this property is included in the settlement arises thus:—Mrs. *Betts* died without issue on the 8th of *June*, 1822. Mrs. *Blake* was married in the same month, and the settlement, made previously to her marriage, bears date the 22nd of *June*, 1822. At the time when the settlement was executed, if my decision is correct, Mrs. *Blake*, then Miss *Redwood*, was entitled to a vested reversion in fee simple in the fund in Court, subject to the life estate therein of Mr. *Betts*. She was an infant at time of the settlement, and the question is, whether this reversion is included in the settlement.

It is not included in express terms; therefore, if included at all, it is so by virtue of the covenant I am about to read.

The settlement, after settling a sum of 711*l.* belonging to Mrs. *Blake*, proceeds in these words:—"In case, at any time or times hereafter, during the said coverture, any real or personal estate and effects, of what nature or kind soever, shall descend, *come to*, or vest in the said *Frances Redwood*, either by will or otherwise, or the said *Wm. Adams Blake*, in her right, at law or in equity,

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equity," the said sum of 711*l.*, and all such other monies, estate and effects, so descending, coming to or becoming vested, as aforesaid, shall be conveyed, assigned and assured, respectively, from time to time, without any delay, by the said *Wm. Adams Blake*, his heirs, executors or administrators, and the said *Frances Redwood*, his intended wife," unto the trustees of the settlement; upon the trusts thereof, &c., &c.

In the first place, it is contended, that this property does not fall within these words; that it was not property which either descended to or became vested in *Mrs. Blake* during the coverture, inasmuch as it had descended to and had become vested in her, on the death of *Mrs. Betts*, and previously to the settlement; that the expression "come to" must be treated as being analogous to or synonymous with the other words. In support of this view of the question, the first case referred to is that of *Hoare v. Hornby* (a), where a similar covenant by the husband and wife to settle "whatever shall become vested in or accrue to or become assignable" by the wife, was held not to comprise property then vested in her, but which was not paid till afterwards. The circumstances of that case are peculiar, inasmuch as the fact of the right of the wife, under the American will of *Mr. Hornby*, seems to have been known at the time of the settlement, the recital in which instrument speaks of property to which she would or might become entitled, in the future, and the operative words of it settle all such property, if any. It is, therefore, very distinguishable from the case before me.

The next case referred to is that of *Otter v. Melvill* (b),
which

(a) 2 Y. & C. C. C. 121.

(b) 2 De G. & Sm. 257.

which is scarcely applicable to the present case, as the question was, whether words importing future property were applicable to property to which the lady was then entitled in possession. In that case, the covenant was, "that all and singular the personal estate, to which the wife shall, at any time or times, become entitled, shall be called in and invested" on the trusts of the settlement. This was held not to include a sum of 1,211*l.*, to which that lady was entitled at that time, and which was in the hands of her father, and belonged to her.

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On the other hand, I have been referred to several cases, which, though not irreconcilable with *Hoare v. Hornby* and *Otter v. Melvill*, are nevertheless unfavourable to the claim of the Petitioner. In *Graffley v. Humpage* (a), a covenant to settle property which, at any time or times thereafter, the wife, or the husband in her right, should "succeed to the possession of or acquire," was held to include a sum of 4,000*l.*, to which she was then entitled, subject to the life interest of her mother therein, and subject to the contingent interest of her children, if she had any, and over which she had an absolute power of appointment. That case is very near the present, nor is there much difference, in my apprehension, between "come to" and "succeed to the possession of or acquire." The case of *James v. Durant* (b) is inapplicable to the present case, as that related to actually existing property, of which the wife was then seized in possession; and the question was, whether it was included in the terms of that settlement, which related to future property. But the case of *Blythe v. Granville* (c) is also very near this case. There, a sum of stock had been transferred by the lady before her marriage to trustees, in trust to pay the dividends to her

(a) 1 *Beav.* 46.

(b) 2 *Beav.* 177.

(c) 13 *Sim.* 190.

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her father for his life, and after his death, to transfer the stock to her. She afterwards married, and by the settlement on her marriage, after reciting that it had been agreed that two other sums of stock, belonging to the wife, "as also all the future property which might devolve upon or come to her during her intended coverture, by virtue of any gift, &c., or by any other means whatsoever, should be settled in manner thereafter mentioned," contained a covenant, by the husband, to do all acts necessary for conveying to the trustees "all the property, of what nature or kind soever, to which the wife should, during her intended coverture, become entitled," in order that the same might be vested in the trustees on the trusts of the settlement. The Vice-Chancellor held, that the words contained in the operative part, without having recourse to the recital, were sufficient to comprise the sum of stock to which the wife was entitled in remainder, after the death of the father. The words used by the Vice-Chancellor are these (a): "Without referring to the recitals in the deed, my opinion is, that the words of the husband's covenant do, *proprio vigore*, bind all the wife's other property in the shape in which it then was." And he thought that the expressions made use of did, therefore, sufficiently describe that thing which she would become entitled to during the coverture.

I am of opinion, that this case is not distinguishable from the one now before me, and that the plain and rational meaning of the words "*come to*," includes property of which the possession was to come to the wife during the coverture, and although the right thereafter to possess it was then vested in the wife. My opinion therefore is, that if this sum of money is to be treated as personalty, it is bound by the covenant of the husband,

(a) Page 197.

l, and must be transferred to the trustees, on the s of the settlement.

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at then it is urged, that even if this be so, still fund will not be subject to the settlement, for that money in Court represents and must be treated, for purposes, as real estate, and that, therefore, as it not come to the husband, he is not bound, and he is, in truth, unable to settle it in accordance his covenant, inasmuch as that can only be done the wife with the consent of the husband, and that covenant of the wife is not binding upon her, inas- as she was an infant when the settlement was ated, and therefore unable to enter into any cove- whatever.

his argument is wholly irrespective of the question dy discussed, and if I am to accede to it, I must hold, that if a real estate had actually descended , or had been devised to this lady, after her cover- it could not have been included in the settlement. I am not of that opinion. If this fund be treated, ll purposes, as land, how could this lady and her and sell and obtain possession of the produce of the of it, unless by a proceeding equivalent to levying a which could only take place by the consent of the and ? And without saying that I am prepared to fol- the old cases, which compelled a husband specifically perform a contract entered into by him, that his wife ld levy a fine, and which, if followed, would in my ion compel the husband to get his wife to levy a fine, der that he might, under his covenant, settle the land ended, according to the trusts of the settlement ; I prepared to say, that his consent to his wife's levying e, for the purpose not of complying with the cove- but of evading it, would be a fraud upon his covenant,

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covenant, and that this Court will not assist him in adopting that course (*a*); the effect of which assistance, if afforded by the Court, would be to hold, that such a covenant as that contained in the settlement now before me, could never be operative upon subsequently acquired real estate of the wife, if she were an infant when she executed the deed. I consider myself wholly unable to adopt the course suggested at the bar, viz. to hold this money to be real estate, for the purpose of avoiding the covenant of the husband, and then to treat it as personal estate, for the purpose of avoiding the necessity of the wife taking such steps, with the consent of the husband, as would be necessary for the purpose of obtaining possession of it, if it were in truth land.

I cannot, therefore, accede to the argument urged on behalf of the Petitioners, and I must order the fund to be paid to the trustees of the settlement, to be held by them upon the trusts thereof.

The costs of both parties must be paid in like manner as the other costs, which I have directed to be paid out of the fund; and the dividends which have accrued due since the decease of Mr. *Betts* will of course be paid according to the trusts of the settlement.

(*a*) See *Milner v. Lord Harewood*, 18 *Ves.* 275; *Blackie v. Clark*, 15 *Beav.* 604.

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SENIOR *v.* PRITCHARD.

DURING the years 1845, 1846 and 1847, the Plaintiff employed Messrs. *Davies & Co.* as his share-brokers and agents, in the purchase and sale of railway shares, and in procuring advances thereon. Half-yearly accounts were rendered by Messrs *Davies*, and on the 31st of *December*, 1847, a large sum appeared to be due to them from the Plaintiff, on the balance of accounts.

On the 3rd of *April*, 1848, a fiat of bankruptcy issued against Messrs. *Davies*, and the Defendants were appointed their assignees.

The assignees brought an action against the Plaintiff, to recover the balance alleged to be due from him to the bankrupts. The Plaintiff thereupon filed his bill, on the 18th *January*, 1853, alleging that he had lately discovered, that the sales stated to have been made were fictitious, and inserted in the half-yearly accounts to deceive him; that they never had been made, or if made, they had been made at a higher price than that stated in the accounts; and that if credit were given to the Plaintiff for the market value of the shares, the balance of account would be in favour instead of against him. The bill prayed a discovery, and an injunction to stay further proceedings in the action, and for "further or other relief."

The Plaintiff, on the 24th *January*, filed interrogatories, according to the new practice, which the Defendants had not answered.

Feb. 8, 10.

The practice as to common injunctions is not, in all respects, assimilated to that in cases of special injunctions.

A *prima facie* case, supported by affidavit, is now required to entitle a Plaintiff to the common injunction; and although that case be met by the affidavit of the Defendant, denying the equity of the bill, still the Plaintiff is entitled to an injunction to stay proceedings at law until answer, in order to secure him the benefit of a full discovery, in aid of his defence at law.

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The Plaintiff now moved for an injunction to stay further proceedings in the action at law, and in support of the motion, filed an affidavit, verifying the allegations contained in the bill. In opposition, *William Davies*, a member of the firm of *Davies & Co.* filed an affidavit, denying those allegations generally except as regarded the employment of the firm as brokers and agents. The half-yearly accounts were averred to be verified.

Mr. R. Palmer and *Mr. Jessel*, in support of the motion.

Mr. Follett and *Mr. Kinglake*, *contra*, contended, that the old practice, which gave the Plaintiff in equity the right to have an action at law stayed till answer, having been abolished by the 58th section of the Chancery Jurisdiction Improvement Act (15 & 16 *Vict.* c. 86), that the present practice of the Court, as to staying proceedings at law, was, in all respects, assimilated to and governed by the principles applicable to ordinary cases of special injunctions, and that the equity of the Plaintiff's bill being here denied upon affidavit, his *prima facie* case was displaced, and his right to an injunction at an end.

Mr. R. Palmer, in reply. Under the old practice, the Plaintiff, upon a Defendant's default in appearing or in answering the bill, might have stayed proceedings at law, upon a bill stating a purely fictitious case, no affidavit verifying his allegations being required. It was the intention of the clause in question to put a stop to this abuse; but a Plaintiff in equity is not to be deprived of his right to a discovery, in aid of his defence at law, by a denial of his case generally.



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The only question is, whether the Plaintiff is entitled to what is analogous to the common injunction, until the answer of the Defendants has been put in. I doubt very much, whether it was intended by the act, that the practice as to the common injunction should, in all respects, be the same as the practice with respect to special injunctions, for it is expressly limited in these terms, "so far as the nature of the case will admit." The grounds of defence in cases of actions at law may be known only to the Defendant in equity, who is the Plaintiff at law, and frequently can only be known by him; and in such cases, the Plaintiff in equity, when he requires an answer and has filed interrogatories, may move for an injunction on affidavits, before the eight days have expired. According to the old practice, he could, upon mere default, move for the injunction without an affidavit. I am disposed to think, that what is meant by the clause in question is, not that the Plaintiff is to be deprived of his right to have an injunction analogous to the common injunction, but that he is not to have it merely as of course (a), but only upon affidavit of merits, in the same manner as a special injunction. It was not the intention of the act to abolish the common injunction, in principle, but only to place it on a new footing. I recollect some strong observations made on this point by the late Vice-Chancellor Sir *James Parker*, who was very anxious that this right of a Plaintiff, under the old practice, should be preserved. As the point however is new, I shall communicate with the other Judges, before I finally decide the question, in order that the practice may be settled.

The

(a) See 45th Order of 7th August, 1852, Ord. Can. 474.

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In this case, I have not had an opportunity of seeing all the other Judges, but I have consulted two of them, and they concur in the view in which I regarded the case when brought before me, which is this:—that the 58th section of the Improvement of Jurisdiction Act does not destroy the Plaintiff's right to the benefit of a discovery, in aid of his defence to an action at law, and that it does not assimilate the practice, completely and entirely, to that in special injunctions, but “so far only as the nature of the case will admit,” that is, the common injunction is not now to be obtained merely on the Defendant's default, as formerly, but a *prima facie* case must be stated on the bill, and be supported by affidavit. Where, therefore, the Defendant has not answered the bill, but has filed affidavits, stating facts, which if there were nothing more in the case, would be sufficient to displace the Plaintiff's equity, yet, as it is quite possible that additional facts restoring that equity may be brought out by the answer to the interrogatories, the Court will grant an injunction till answer.

Without saying that the Court will lay down a strict rule, which it will not, in its discretion, depart from under any circumstances, I think that in this case, the Plaintiff is entitled to an injunction, until the Defendant in equity shall have answered the interrogatories, or until the further order of the Court. The adoption of any other course would, practically, prevent the Defendant at law obtaining the benefit of a discovery in such cases.

The injunction will stay the trial, and on the answer being put in, the Defendants may move, in the same way as

formerly, and have the injunction dissolved, if cause not shown on the answer. I do not, however, decide whether an affidavit may or may not be filed on the motion to dissolve (a).

(a) See 15 & 16 Vict. c. 86, s. 59.

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MESSRS. *Holmes* were indebted to Messrs. *Hustler* and *Blackburn* upon a mortgage carrying interest, and to other persons on simple contract.

Specialty creditors, whose debt carried interest, and other creditors, whose debts did not carry interest, executed a creditors' deed, by which the debtor's property was to be divided between the creditors, "rateably and in proportion to the amount of their respective debts." The creditors released their debts. Held, that the specialty creditors were entitled to a dividend on the amount of interest accruing subsequent to the date of the deed.

On the 11th of *September*, 1829, a creditors' deed was executed, whereby the debtor's property was conveyed to trustees, in trust to realize, and to carry on the business until the property could be disposed of, and to hold possessed of the proceeds to be derived therefrom, upon trust to pay the costs, charges and expenses. The deed then proceeded in the following words:—
And then shall and do pay, divide and distribute the residue and remainder of the said trust monies and presents, unto and equally amongst themselves and such persons, the creditors of the said *Thomas Holmes* and *Sainman Holmes*, as shall, personally or by their agents or attornies, respectively, execute these presents within one calendar month from the date hereof, *rateably and in proportion to the amount of their respective debts*, and in full discharge thereof. But if such residue shall be more than sufficient to pay the whole of such debts, then upon trust to pay the overplus hereof unto the said *T. Holmes*."

The deed proceeded:—"And the said creditors, respectively,

(a) Reported 6 *Hare*, 496.

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respectively, do agree to accept the effects and premises hereinbefore conveyed, &c. in full payment, satisfaction and discharge of the several debts or sums of money *now due* and owing to them, respectively, from Messrs. *Holmes*, and do hereby fully and absolutely remise, release, and for ever quit claim unto and discharge Messrs. *Holmes*, of and from all and every the debts and debt, sums and sum of money *now due* and owing, or contracted and not yet due to them, the creditors, from or by Messrs. *Holmes*, in anywise, and from all actions, suits, &c., which they (the creditors) now have, ever had, or at any time hereafter can, shall or may have, claim, challenge or demand, for or by reason of the same debts."

The deed contained no reservation of the benefit of any security, nor any statement of the amounts of the debts due to the several creditors. It was executed by Messrs. *Hustler* and *Blackman*, and by several other creditors by simple contract, whose debts did not carry interest.

The property was not realized until five years from the date of the deed, and then a dividend of 15s. in the pound was paid to the creditors. The trustees paid to Messrs. *Hustler* and *Blackburn* a dividend of 15s. in the pound, not only on the debt of 3,348*l.*, but also on five years' interest thereon, which accrued between the date of the deed and the division.

The Plaintiffs, upon exceptions to the Master's report, who had allowed this sum to the trustees, insisted, that this payment of a dividend on interest, which amounted to 625*l.*, was improper, and ought not to be allowed to the trustees.

Mr.


Mr. *Elmsley* and Mr. *Humphrey*, in support of the exception. By the composition deed, the creditors released their debts, which thereby became wholly extinguished. The specialty creditors had afterwards no claim, except the provision made for them by the deed, and were then bound to come in, *pari passu*, with the simple contract creditors, whose debts did not carry interest, in proportion to the amount due to them, respectively, at the date of the deed. The assets were to be divided, "rateably and in proportion to the amount of their respective debts," that is, of their debts at that time. Such is the practice in bankruptcy. It would have been a fraud on the simple contract creditors, for the specialty creditors to stipulate for a greater advantage than that provided by the deed for the other parties to the deed; *Cullingworth v. Lloyd* (a); *Buck v. Shippam* (b).

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Mr. *John Baily* and Mr. *Amphlett*, *contra*. The trustees were right, in paying Messrs. *Hustler & Co.* a dividend on the amount due to them for interest, for the amount of their debt consisted of principal and interest. If the original debt and the interest were extinguished by the composition deed, still a new obligation arose for payment, rateably with the other creditors, of the same debt, consisting of principal and interest, so far as the assets would extend. This appears clear from the consideration of the case, in the event of there being more than sufficient to pay the whole. Would not the specialty creditors be entitled to interest, or would the debtors have the benefit of the delay in realizing the assets?

(a) 2 *Beav.* 385.

(b) 1 *Phill.* 694.

1853. assets? The principle of division in bankruptcy is in-

 BATEMAN applicable to other cases, *Mason v. Bogg(a)*. There can
 v. be no illegality, for there was no concealment, the whole
 MARGERISON. contract being patent on the composition deed itself.

Mr. *Elmsley*, in reply.

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I am of opinion, that the release of the debts does not affect the question, which is, what are the rights under the deed, which are substituted for the debts? It is true, that under a composition deed, no creditor can stipulate for a private advantage for himself; but here nothing was secret, the rights depend on the deed alone. The question seems to be, whether there is any rule of law, which requires that when specialty and simple contract creditors execute a creditors' deed, the specialty creditor is to be considered as having abandoned his right to interest on his debt, unless he expressly reserves it.

Judgment reserved.

Feb. 10. *The MASTER of the ROLLS.*

The question on which I reserved my judgment arises on the 15th exception to the Master's report, and is this:—a trust deed for the benefit of creditors has been executed by the debtor, by the trustees, and by specialty and simple contract creditors. The assets have

(a) 2 *Myl. & Cr.* 443.

have not been realized and divided till nearly five years after the execution of the indenture. In what proportions are the assets to be divided? Is the debt due to the specialty creditor to be considered as augmented by the interest, which would have accrued on his debt, if he had not executed the deed, during the time which elapsed between the date of the deed and the division and distribution of the assets? or is the interest to be treated as stopped, from the time when the specialty creditor executed the deed? The deed is silent on this subject.

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The words of the trust are as follows—[*His Honor stated them*].

I entertain no doubt, that if it had been expressed in the deed, either that the interest was to be calculated on debts carrying interest only, or on none, or what would have been the same thing, on all, it would have been perfectly valid and legal. The difficulty is, that the deed is silent on the matter.

I have not been able to find any decision on this point. The cases are frequent, where the Court has set aside an arrangement entered into by a party to a deed of this description, for his private advantage. But this is not a case of that kind. No private stipulation was made, and if a specialty creditor is entitled to interest, he is so entitled upon the face of the deed and upon the true construction thereof, or upon the principles of law, which must govern the distribution, in the absence of express contract.

Although I have been able to discover no direct decision

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cision on the point, the case of *Hamilton v. Houghton* (a) throws some light on the subject. In that case, lands and hereditaments had been conveyed to trustees and their heirs, upon trust to sell, and out of the proceeds "to discharge the debts and incumbrances mentioned in the schedule to the release annexed, together with all interest then due thereon respectively." Upon the debts in the schedule, which carried interest, the interest was computed, and the word "interest" was written under them. Lord *Eldon*, in giving judgment in that case, observed, that the decree for carrying into execution the trusts of such a deed should have called on the Master to inquire what debts and incumbrances remained to be paid under that trust, bringing before the Court all persons interested in that inquiry, and then paying and satisfying them proportionally, if the funds could not pay all the creditors; paying them entirely, if the funds would pay them all; paying interest to such of them as were entitled to interest, and not paying interest to such of them as were not entitled to interest" (b). Although in that case, the deed had specified interest, in the manner I have mentioned, yet it was only the interest then due; and as the deed is not set out *in extenso*, but only recited, it is impossible to ascertain, whether the word in the deed was "*then*" due or "*now*" due. However, Lord *Eldon* was of opinion, that the debts carrying interest ought to have interest computed upon them up to the time of payment.

It appears to me, that in the absence of contract, the same principle is applicable. Suppose the estate conveyed to the trustees had realized sufficient to pay every one in full, both principal and interest, (if interest were due,) and still leave considerable surplus for the original debtor

(a) 2 *Bli.* 171 (O. S.)

(b) 2 *Bli.* 187 (O. S.)

debtor, on what principle could it be contended, that those debts which carried interest were not to be paid in full, both principal and interest? and if that be so, can the true construction of the deed be varied, or can the principle of the law applicable to such case be different, because the assets realized in the hands of the trustees happen to bear a greater or lesser proportion to the debts? The interest due up to the date of the deed was clearly a part of the debt due to the specialty creditors. Why was the interest which subsequently accrued due, up to the time of payment, to be excluded? To say that a creditor cannot stipulate for a private advantage, has, in my opinion, no application at all to the case before the Court; if it had, it might, with greater reason, be urged as an argument against the exceptions, inasmuch as if the assets were to be divided in proportion to all the debts, those due by specialty being unaugmented by the interest which has subsequently accrued due, such a division does, in effect, give the simple contract creditor interest on his debt up to the time of payment; it being obviously the same thing, whether the interest (assuming the rate of it to be uniform) be calculated at the same rate on all the debts, and the division made according to the proportion of the debts so augmented, or whether the interest be stopped on all, and the division made according to the proportion of the original debts simply; and in this way, the simple contract creditor would, in effect, get something under the deed which he had not contracted for, which does not appear on the face of the deed, and which, according to law, if no deed had been executed, he could not have obtained.

The legal right of the specialty creditor is to have his principal and interest. I think that the burthen of proof lies on those who contend that the debts of the
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creditors are not to be calculated in the way in which they would be calculated at law, in the absence of any special contract to the contrary.

The argument drawn from the fact, that by the deed the creditors released the original debtor, wholly and entirely, from all debts and all claims, demands and suits in respect thereof, does not weigh with me. The contract is, that in consideration of certain property being made applicable to the payment of their debts, the creditors should, and they do, thereby, wholly release the debtors from all their debts. The debt is no doubt gone, as far as the original debtor is concerned, and all remedies, by action or otherwise, as against him, are finally concluded; but it is not less extinguished, as regards the principal of the debt, than it is, as regards the interest of the debt, whether it be interest then due or thereafter to accrue due, and I am at a loss to understand, what valid argument can be deduced from thence, to lead to the conclusion, that the interest on the debt of the *cestui que trust* is stopped. The trust on the deed is to pay the debts of the creditors, that is, what the original debtor, unless he had been freed by this release, would have been liable to pay to them, that is, principal and interest on all debts carrying interest. To give any weight to this argument would be, in my opinion, impossible, unless I were to hold, that the principal of the debt was gone as well as the interest, and that nothing whatever could be recovered under the deed. The original debtor is released, his debts are transferred to and made a charge upon the property, conveyed in trust to be divided amongst the persons, who, up to that time, were his creditors. In other words, the creditor is converted into a *cestui que trust*; and the extent of his interest, as *cestui que trust*, appears to me to be measured by the amount of that sum of money, which would have

have been due to him from the original creditor at the time of payment, unless there be some contract between the parties to the deed, varying their rights and interests. In this case there is no such contract, and consequently, I am of opinion, that the Master came to a sound conclusion, and that this exception must be disallowed.

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The YORK and NORTH MIDLAND Railway Company v. HUDSON.

Jan. 17, 18, 19.

Feb. 11.

THIS case was argued by

The Solicitor-General (Mr. *Bethell*), Mr. *R. Palmer*, and Mr. *Hobhouse*, for the Plaintiffs.

Sir *Fitz Roy Kelly*, Mr. *Rolt*, Mr. *Toller*, and Mr. *C. H. Grove*, for the Defendant.

The Solicitor-General, in reply.

The following cases were cited:—*Hichens v. Congreve*;

A general meeting of a railway company placed 12,050 shares in a projected extension line at the disposal of the directors. Held, that the disposal was merely as trustees for the company, and not for their own benefit; and *Hudson*, who was the chairman (and exercised uncontrolled au-

thority in the conduct of the concerns of the company), having sold a considerable part of such shares at a premium, was held liable to account to the company for their produce, with interest at 5*l.* per cent. Held also, that he could not retain the profits, either as a large landowner on the line, or as a remuneration for his great services, or on the ground of the acquiescence of the shareholders, to be inferred from a presumed knowledge of the share-book.

The chairman of a railway company allotted a number of the unappropriated shares to his nominees; they were sold at a premium, and the produce received by him. Held, that, as trustee, he was bound to the company for the profit made.

The chairman of a railway company appropriated various unallotted shares to the use of various persons, whose names he did not mention, in order to secure or reward services which he declined to state, but which it was insinuated was in the nature of "secret service money." Held, that if the Defendant had applied the property of the company in a manner which would not bear the light, he must suffer the consequences; and that being charged with the receipt of the money, he could not discharge himself by the suggestion of such an application.



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*The MASTER of the ROLLS* reserved his judgment.

Feb. 11. *The MASTER of the ROLLS.*

This is a suit instituted by the *York and North Midland Railway Company* against the Defendant, to make him account for the price or value of certain shares in that company, disposed of by him or by his order, during a period of about fifteen months, from *October, 1846, to January, 1848*. Although the case occupied a considerable time in argument, it does not present any considerable difficulty, either from the complication of facts, or from the application of the principles of equity to those facts.

The

- (a) 4 *Russ.* 562.
- (b) 1 *Russ. & Myl.* 132.
- (c) *Cr. & Ph.* 1.
- (d) 2 *Atk.* 405.
- (e) 15 *Ves.* 218.
- (f) 17 *Ves.* 298.
- (g) 2 *Beav.* 559.
- (h) 8 *Beav.* 503.

- (i) 1 *M. & K.* 226.
- (k) Sects. 58, 59, 88.
- (l) 1 *Rail. Ca.* 462.
- (m) 5 *Hare*, 1.
- (n) 12 *Beav.* 460; 2 *Macn. & Gor.* 146; 2 *Hall & Tw.* 430.
- (o) *Turn. & Russ.* 496.

The *York and North Midland Railway Company* had been incorporated by statute, in the year 1836. From the time of its original formation, the Defendant had been the chairman of that company, and it is the common case both of the Plaintiffs and of the Defendant, that he possessed and exerted an unusual degree of influence in the management of the company. He gave orders on his own sole authority to the servants and officers of the company, respecting the management of it, and he even delegated persons to give orders as coming from himself. These orders seem never to have been disputed, and he exercised an uncontrolled authority in the conduct of every part of the concerns of the company; and inasmuch as the other directors seem rarely to have interfered, or when they did, to have acted only at his instance, and to give effect to his directions, he may, in some sense, be said to have constituted by himself the board of direction of the company. It is the common case also both of the Plaintiffs and of the Defendant, that the company throve much, in public estimation at least under this management, and it was generally regarded, in the beginning of the year 1846, as being in a state of great prosperity.

In the year 1845, if not earlier, a project had been entertained, to extend the operation of the *York and North Midland Railway Company*, by the formation of three new lines of railway—one of which was to extend from *York* to *Beverley*, a second from *York* to *Leeds*, and the third was to extend the *Whitby and Pickering Railway* to *Castletown*; and, accordingly, in the month of *January*, 1846, at the regular half-yearly general meeting of the company, held on the 16th of that month, after the annual report had been read and adopted, the Defendant, as chairman of the company, explained the projected extension to the assembled shareholders,

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shareholders, and obtained their sanction and authority to apply to Parliament for powers to make these additional lines, and to raise the capital necessary for the purposes there mentioned. The amount of capital to be raised, and the way in which it was to be apportioned were publicly explained to the meeting by the Defendant, and were embodied in a resolution passed by the meeting, which I shall have presently to comment upon. The plan was this:—An additional capital of one million and a quarter was required; it was to be raised by 50,000 shares at 25*l.* each, to be called the *East and West Riding* Extension Shares, and these were to be apportioned in the following manner:—They were to be allotted to every person holding shares in the *York and North Midland* Railway, in the proportion of one extension share to every share of 50*l.*, and one extension share to every two shares of 25*l.*, held in the *York and North Midland* Railway Company. This, according to the number of such original shares, would exhaust 37,950 of the extension shares, and the remainder, amounting to 12,050, were to be left at the disposal of the directors. The resolution which was passed is distinct in its terms to this effect. The relief sought in this cause relates to the proceeds of a portion of the shares, so left to the disposal of the directors. The acts authorizing these extensions, and the raising of the capital necessary for this purpose, passed in the session of 1846 with much difficulty, as the Defendant alleges, and as I have little doubt correctly alleges, mainly by the exertions which he had made, before and after the meeting of *January*, 1846, to obviate and destroy opposition. The 37,950 shares, subject to a slight deduction of thirty shares, which is not material to be noticed, were apportioned amongst the shareholders of the *York and North Midland* Railway, in the manner provided for by the resolution, and were set against

ist their names in the Share Register Book ; and in  
 distribution, the Defendant received his aliquot  
 portion of extension shares, according to the number  
 value of the original shares held by him. The re-  
 ing 12,050 shares were carried in the Share Re-  
 r Book to the name of the Defendant, not in the  
 : where his name stands in the alphabetical list,  
 where the shares held by him beneficially were  
 d, but at the end of the register, after the name of  
 ast shareholder had been entered with his appro-  
 e number of shares. The directors, as a body, have  
 anctioned any disposal of these shares, and accord-  
 ; no minute or entry is to be found in the record  
 ie proceedings of the directors relating to them.  
 seem, however, to have been thus disposed of :  
 t 1,800 were applied in a manner which, though it  
 not appear to have been productive of benefit to  
 ompany, is not complained of ; 4,991 still remain  
 propriated ; and it is with reference to the remainder,  
 what exceeding 5,000 in number, that this bill  
 s relief. It appears, that in the course of the  
 ths of *October, November and December, 1846*, and  
 ighout the whole course of the year 1847, the  
 ndant caused a considerable number of these shares  
 e issued and transferred into the names of various  
 ns, who were his nominees, and that he caused  
 to be sold by brokers on the Stock Exchange, at  
 iums of various amounts, varying from 10*l.* to 18*l.*  
 share. I do not consider it necessary, for the pur-  
 of explaining either the grounds of my decision, or  
 nature of the decree I am about to pronounce, to go  
 the details of these various transactions, which are  
 ed with great minuteness by various witnesses. I  
 k it sufficient to state, that it appears to me to be  
 blished by evidence, that upwards of 5,000 shares  
 e so disposed of, and that in the great majority of  
 these

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these cases, it is proved, that the money arising from the sale was either paid to the account of the Defendant at his bankers, or by his order and according to his direction. The Plaintiffs admit that they have received payment of all the money due on these shares, in respect of the deposit and calls; but they contend, that this is not the limit of their rights, and that they are entitled to call upon the Defendant to pay, to the company, the profit derived by him on the sale of these shares at a premium. If the matter rested on these facts alone consistently with the rules of equity, daily administered by this Court, there could be no question as to the course to be adopted, and the decree to be made. If these shares were the property of the Defendant, he was entitled to make what profit he could of them for his own private advantage. If, on the other hand, they were the property of the company, he was bound to account to the company for every shilling of the profit derived from the sale of them. To determine in what character he held these shares, it is necessary to recur once more to what took place at the meeting in *January, 1846*. The resolution says, that the 12,050 shares were to be “at the disposal of the directors;” the Defendant contends that the meaning of these words, unassisted by the observations he made previous to the adoption of the resolution, is plain, and that they mean, that the directors might do what they pleased with these shares, and that the meeting intended to give them to the directors, for their own use and advantage; but that whether this were so or not, that, at least, it was intended, that no account should ever be required as to the mode in which the directors did dispose of them; and further, he contends, that it was well known, and is the common case of the Plaintiffs and Defendant, that he, as chairman, did in fact constitute the whole practical board of direction of the company, so that an intention to put these shares at the disposal

**disposal** of the directors was, in truth, an intention to **put** them at the disposal of himself, the chairman; that **this** was so understood by every one present at the **meeting**; and that, if it were not manifest on the face of **the** resolution, it was made so by the observations which **he** addressed to the meeting previous to its adoption. If **this** be once established, then he contends that all difficulty ceases, for that this course was sanctioned by the **fourth** section of the statute of 9 Vict. c. 66, which **was** afterwards passed in that year, and which enacted, **that** these shares were to be distributed, in such manner, **as** a general meeting of the company should have **directed**, or might thereafter direct. Upon the construction of the resolution, unassisted by the observations of the chairman, I have not come to the conclusion so suggested; the directors are persons selected to **manage** the affairs of the company, for the benefit of **the** shareholders; it is an office of trust, which, if they **undertake**, it is their duty to perform fully and entirely. A resolution by shareholders therefore, that shares or **any** other species of property shall be at the disposal of **directors**, is a resolution that it shall be at the disposal of **trustees**; in other words, that the persons intrusted with **that** property shall dispose of it, within the scope of the **functions** delegated to them, in the manner best suited to **benefit** their *cestuis que trust*; to construe these words as importing a gift to the directors for their individual **advantage**, or as investing them with a secret and irresponsible trust, would, in my opinion, be impossible, unless they were coupled with clear and unambiguous expressions to that effect. In the absence of any such expressions, not only the obligation of discharging the **duty** lies on the persons accepting the trust, but also the further obligation of accounting for their discharge of it to their *cestuis que trust*, whenever required. I turn, therefore, to the observations made by the Defendant at this

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this meeting, for the purpose of ascertaining, whether they contained such an intimation of the purposes for which these shares were left at the disposal of the directors, as the Defendant contends for; and in doing so, I assume in the Defendant's favour (without in any way deciding it), that the meaning of the resolution can be varied by such observations. Having attentively read these observations, I find nothing in them to shake, but, on the contrary, much to confirm the construction which the language of the resolution bears when taken alone. The expressions relied upon are these. [*His Honor read the first and second resolutions.*]

If in consequence of these observations, the directors or even the Defendant had distributed the shares in question, or any portion of them, to the landowners of the district referred to, or to such other persons as were interested in that district, and who, but for such distribution, would have offered serious opposition to the passing of the bill, and it were now sought to make the directors liable for the premiums which they might have obtained by the sale of these shares, if they had sold them instead of so distributing them, I could understand the force of the argument used and dilated upon, and of the complaint made by the counsel for the Defendant, that the claim of the Plaintiffs was inconsistent with good faith. But of the 5,000 shares, the profits arising from the disposal of which constitute the matter for which the Plaintiffs require the Defendant to account, not one is shown to have been given to any landowner or to any other person interested in the district referred to, with the exception of the Defendant himself. To contend, in the face of these expressions, that the assembled shareholders must have understood and meant, by their resolution, to convey, that these shares were to be at the disposal either of the directors
 or

endant (assuming the words synonymous), might, if he pleased, put into his own pocket, the profit to be derived from them, appears prehensible. It is admitted, that at that well known, that the scrip when issued high premium, probably upwards of 10*l*. If the shareholders meant what is con- behalf of the Defendant, they must have able the Defendant to put into his own rds of 100,000*l*., of which sum they might benefit, either collectively or individually, st also have intended, when they did this, ed to relinquish all claim to the grace and making a gift to their chairman or of con- our upon him, and must, therefore, have accomplish it in a covert and secret manner, ar as I can perceive, any assignable motive . I have looked in vain for a single ex- how that the Defendant sought to derive, tended the meeting to believe that he in- as to derive, the slightest advantage from being placed at his disposal. It is true a large landowner on the line, but one of rged by him to the gratitude of the com- ch I shall presently have to advert, is, that l this estate, with a view of disarming the hich might have been expected had it re- e possession of the former owner. But, in e, there is no evidence to induce me to sup- e Duke of *Devonshire*, the former owner, opposed this bill in parliament; and se- ere were, it is plain, that the opposition of as not disarmed but made more dangerous, an of the company was to fill the double trustee for the shareholders on the one f landowner, whose opposition was to be bought

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bought off, on the other. In my opinion, the expressions to which I have referred, vague and indefinite as they are, at the best, have no meaning when addressed to a body of shareholders, unless they are understood to infer, that the distribution of shares was to benefit the company, by the conciliation of landowners and of persons interested in the district through which the railway was to pass, not for the purpose of making a gratuity to them, at the mere expense of the company, but for the purpose of benefiting the company, by applying the shares in order to remove impediments that might arise, by the opposition of persons of that description, and who were not, from their position, bound, as the Defendant was, to do all in their power to assist the plan of the company. It does not, in my opinion, in the slightest degree, shake or alter the conclusion to which I have come on this part of the subject, that, in 1843, a large number of shares were, in another line of railway from *York* to *Scarborough*, (forming, as I was informed, a separate company, though connected with this) put expressly at the disposal of the Defendant, who was the chairman. In that case, two of the shareholders objected that this was, in truth, putting a large sum of money belonging to the company, amounting to many thousand pounds, into the pocket of *Mr. Hudson*. The meeting discussed that question, and thought that *Mr. Hudson's* services had been such, that he deserved that gratuity, and accordingly decided, that the present should be made to him, which was accordingly done. Had anything of a similar description occurred at the meeting in *January*, 1846, if one of the shareholders had then addressed the meeting, and said that "the directors" means "*Mr. Hudson*," that putting 12,050 shares at the disposal of the directors is putting them at the disposal of *Mr. Hudson*,—that the shares will certainly be, on the issue of the scrip, at a premium of not less

per share, and that this is, in fact, a resolution of 20,500*l.* in the pocket of Mr. *Hudson*;—if he had made such observations as these, and if that purpose had been avowed at the meeting in *January*, 1846, as it was at the meeting of the shareholders of the branch in 1843, and if, after all this, the directors determined to make that present or gratuity to *Hudson*, in consideration of his services to the company, then would have arisen, in this case, the question, which seems never to have been decided in 1843, and which, in my opinion, it is not now to decide, viz., the question whether a majority of shareholders has the power, within the act of parliament and the partnership agreement, to bind absent persons, or a minority, in thus disposing of the funds of the company. That question does not, in my opinion, arise in the present case, but I am anxious that it should fall from me to lead to the conclusion of the Court, consistently with the principles of law, that the directors, could sanction such a proposal, and that the duties and powers of the directors, where the shareholders are defined, with reasonable limits, by the statutes applicable to this subject; and that the mode of proceeding in the case of a company, as great as can be conceived, and as are here been performed by Mr. *Hudson*, is, that the shareholders should, from their private means, contribute such sums of money, or give as each may think fit towards creating a fund for such persons.

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As to the power of a majority of shareholders at a public meeting, to dispose of the funds of a company, so as to bind absent shareholders, or even a minority.

It is contended, on the part of Mr. *Hudson*, that the dividends on these shares formed no part of the capital of the company; that the capital was fixed by

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When shares
 are left at the
 disposal of di-
 rectors, they
 cannot, directly
 or indirectly,
 derive any per-
 sonal advan-
 tage from their
 disposal.

the statute, and could not be increased; that the capital was one million and a quarter, and no more; and that these shares were allotted, and the deposit and calls paid upon them, it was no concern of the company by whom they were paid, and that the capital of the company would remain the same. I have not come to that conclusion. I think it immaterial to consider, whether the profits derived from the disposal of the 12,050 shares ought to be treated as capital or income. The statute expressly states, that the shares shall be distributed, in such a manner as a general meeting shall have directed or shall direct; and if the general meeting had converted this profit into capital, or if they had divided it amongst themselves, as part of the profits, they had, under the act, the power to do so. The act therefore has sanctioned the resolution; and, in my opinion, the fair construction of the resolution was this:—the shares are left to be disposed of by the directors, according to their judgment and discretion, as they may consider best for the interest of the company; that is, for the interest of the shareholders of the company. The directors were not, I think, intended to be made liable, in case, through an error of judgment, they had disposed of some of the shares, in a manner which ultimately turned out not beneficial to the company, although it seemed to be so, when they parted with them. They were not, I think, intended to be made liable, in case they had, through an error of judgment, omitted to realize advantages from them, which might have been obtained; but they were, in my opinion, bound to be ready, at all times, to explain their conduct in this matter to the shareholders, and, above all, on no principle could they derive to themselves directly or indirectly any personal or pecuniary advantage from the mode in which they might dispose of these shares. This is, in my opinion, the fair construction of the resolution, and it is the only one

one which is consistent with equity, and the principles on which this Court acts in matters of trust. Such also appears to have been the construction which the Plaintiffs have put on it, for no complaint is made in respect of shares to the number of 1,800, forming part of the 12,050 shares, which seem to have been disposed of in a manner which, whether beneficial or not to the company, has not produced, and was not intended to produce, any personal or pecuniary advantage to the Defendant, or to any of the directors.

The defence I have hitherto been considering affects the whole relief sought by the Plaintiffs, and their title to require an account of anything; but if the Defendant fails, as in my opinion he does, in establishing it, he then sets up a separate defence, applicable, in detail, to different portions of the shares disposed of by him. In the first place, he says, that though the argument urged on his behalf, which I have hitherto been considering, would apply in terms to the whole number of 5,000 shares disposed of by him, he does not seek to retain the profits on all these shares for his own advantage. The way in which the case is put by him, or by his counsel, is this:—The number of shares, the misapplication of which is complained of by the bill, is 5,105; 2,300 of these the Defendant says he sold for the benefit of the company; and though, as he contends, he might claim for himself the benefit derived from them, that he does not seek to do so, but says that he is, and always has been, content, that the company should have the profit derived from them; and as evidence of this, he refers to the fact, that on the 16th of *July*, 1848, he paid 16,000*l.* to the credit of the company, which is, what he calculates to have been, the profit derived from the sale of these 2,300 shares. The remaining number of shares he thus disposes of:—1,105 shares were, he

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says, applied to the use of various persons whose names he does not mention, in order to secure or reward services which he refuses to state. The remainder, consisting of 1,700 shares, he admits he applied for his own use; and he justifies and insists on his right to do, as being only a just and barely an adequate reward for the services rendered by him to the company. With respect to the 2,300, it is plain, even if the observations I have already made did not apply, that he has submitted to account, and that he must account accordingly, and that in taking such account, he must be allowed the 16,000*l.* he has paid, in that respect, together with all just allowances. With respect to the 1,105, it is insinuated in the pleadings, and openly asserted at the bar, that some secret service-money of this description is essential, for the purpose of enabling the promoters of a bill to pass it through parliament, and that the services performed, and the persons rewarded for the performance of them, must, necessarily and as an indisputable condition, be kept concealed; and this was pushed so far as to say, that various persons who would be too high-minded to take a bribe, in the shape of money, for assistance to be rendered in parliament, would not scruple to accept, at par, shares, capable of being sold in the market at a premium as a remuneration for the same services. Whether this be true or not, I am unable to state. I can only state, that having had some experience in parliament, I do not believe, that an attempt to resort to any such means is necessary or useful, for the purpose of furthering the progress of a bill in parliament. I am sure, that if practicable, it is a highly improper application of money or shares, and that this Court will not attend to the suggestion of such a mode of application, as an excuse for not rendering an account.

If

Defendant has applied the property of the company in the manner which will not bear the light, and for which he can not, with propriety, be stated even to be the authorized shareholders of the company, and which purpose has not been distinctly sanctioned by them, the Defendant must bear the consequences; and if he be not furnished with the receipt of the money, he cannot disavow himself by suggestions of any such application or application of it.

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As regards to the remaining number of 1,700 shares, Defendant avows, that he has applied to the company; and it is contended by him, and by his counsel on his behalf, that regard being had to the services he had performed, and the scanty nature of the salary he received as chairman, the remuneration which he thus helped himself was but a small and inadequate return, for the advantages he conferred upon the company. If this plea were admitted at all, it would be incumbent upon me to go into detail, the services rendered by the Defendant, having done this, then to inquire what benefit, in the shape of remuneration, the Defendant had derived from these services, which would necessarily increase in cases, if any existed, of voluntary remuneration of the shareholders, in their individual character, and in which occurred in the *Scarborough* Branch, the Defendant has pointedly called my attention; in truth, the plea is wholly inadmissible. When *Hudson* accepted the office of chairman, he received the salary was not more than 1*l.* per week, and he was content to give his services on that footing, might possibly have considered, that the station and influence acquired in the position of chairman of the *North Midland* Railway was a remuneration for the time and labour bestowed by him, even if his services

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services were not paid by any salary at all; but whether this were so or not, it is the duty of every man who accepts any situation, to perform the duties of it thoroughly and entirely. If they require his whole time and attention, it is his duty to give that whole time and attention to the due discharge of them. This Court can never countenance a person who is placed in a fiduciary situation, in retaining, for his own benefit, sums of money which have come to his hands, or have been acquired by him in that character, although the acquisition of those sums is due to his own exertions, on the suggestion, that his services were worth more than what was paid for them, and that he was himself entitled to ascertain and determine the just measure of their value. If this principle were allowed, I know not what there would be, to prevent any clerk from retaining the property of his master, on the plea that his master had not adequately rewarded his great and meritorious services.

If all these defences fail, then another head of defence is brought forward, which is, that of acquiescence by the Plaintiffs. It is contended, that they knew and did not complain of the appropriation of shares for many years, and that, consequently, they must be taken to have assented to it. The facts which are said to amount to acquiescence are those to which I have already shortly adverted, and which are as follows:—the Share Register Books were produced to the general half-yearly meetings in *January* and *July*, 1847, and in *January* and *July*, 1848. In all of them, the list of the shareholders is continued down to and including the letter Z. After this, there appears in the book which was produced at the general meeting in *January*, 1847, an entry of 9.610 shares, in the name of Mr. *Hudson*. At the close of the list in the book produced in *July*, 1847, a similar entry appears in the same place, but the
number

number of shares is reduced to 8,591. In *January*, 1848, a similar entry of 5,141 shares, and in *July*, 1848, a similar entry of 4,991 shares, which is the remainder of the 12,050 shares, which, as I have already stated, remained unappropriated, at the time when Mr. *Hudson* ceased to be a director of the company. These entries were open to the inspection of all the shareholders present at those meetings. They must, therefore, it is said, be considered to have read them, and thereby to have become cognizant of the fact, that the shares were allotted to Mr. *Hudson*; and as they have taken no step in consequence, they must be considered to have acquiesced in this appropriation, and therefore they cannot now disturb or complain of it. I abstain from considering whether any acquiescence to bind a company could be inferred, in the absence of any positive act of that character, from the circumstance, that any individual shareholder might have seen such an entry, on four successive half-yearly occasions, the first of which is less than three years before the bill was filed; because I think it obvious, that these entries have not the effect contended for. The place and manner of the entry show, clearly, that these were the unappropriated shares which were to be at the disposal of the directors; if they had been appropriated to Mr. *Hudson*, they would have appeared attached to his name, in the list, in its regular and alphabetical place; and so far was it from being considered, that this was an appropriation of these shares to Mr. *Hudson*, it is the common case both of the Plaintiffs and of the Defendant, that the last entry of 4,991 describes the shares remaining at the disposal of the directors, and which had never been appropriated by them, either to Mr. *Hudson* or to any other person. If the first entry be good, to show that 9,610 shares had been appropriated to Mr. *Hudson*, then the last entry is equally good, to show that the

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the 12,000 shares appropriated by the company which were entered in the name of the chairman company, at the conclusion of the share list, in order to designate them. Whether this was the correct entry, or whether the more proper form would not have been, to have entered the shares to the directors company, it is not, in my opinion, for the purpose of this suit, material to inquire. I am of opinion, therefore, that so far as regards the *East* and *West Riding* Shares, the defences set up by the Defendant fail, and that he must account to the Plaintiffs, the profits derived by him from his disposal of these

I have now to consider the case of the *Hull and Selby* Railway Shares on this subject. The facts appear to be these. In *July*, 1846, an act was passed which authorized the *York and North Midland* Railway Company to purchase the *Hull and Selby* Railway, and also to raise the additional capital necessary for this purpose, not exceeding 2,000,000, by the creation of new shares, according to the directions of the past or future general meeting, specially convened for this purpose. In *October*, 1846, the *York and North Midland* Railway Company, at a meeting specially convened for this purpose, came to a resolution to purchase the *Hull and Selby* Railway, and to raise the necessary sum by the creation of 62,050 shares, which

was entitled, if he pleased, to take one of these shares for every share of 50*l.*, or any two shares of 25*l.* each held by him in the *York and North Midland* Railway Company. The number of shares in the *Hull and Selby* Railway required for this purpose, if every shareholder took the full number of shares he was entitled to, was 58,014, leaving a balance of 4,936 unappropriated in the hands of the company. I have not ascertained the exact accuracy of these numbers, nor is it material for the purposes of my present decision. The bill complains, that many of these shares were sold by the Defendant, for his own purposes, and according to the evidence, it appears, that 1,912½ shares were, from time to time, allotted to various persons, who were mere nominees of the Defendant, were sold by brokers in the market for various sums, but always at a premium, and that the produce has been paid to the account of the Defendant at his bankers, or applied according to his direction. The question is, whether the Defendant is bound to account to the company for the profit thus realized by him. After the observations I have made respecting the *East and West Riding* Extension shares, very little need be said to explain my decision with reference to the *Hull and Selby* shares. The question is governed by the principles, I have already stated to be applicable to the transaction relative to the disposal of the *East and West Riding* Extension shares. In truth, if what took place at the meeting in *January*, 1846, and the resolution then passed by the meeting, could be considered as any justification for the course adopted by the Defendant, with reference to the *East and West Riding* Extension shares, that justification is wanting, so far as regards the *Hull and Selby* shares. There was no resolution of any general meeting respecting these unappropriated shares. There was no observation made at any general meeting by the chairman, or by any of the directors,

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directors, concerning them. They were simply appropriated shares in the hands of the company, the Defendant caused to be appropriated to whatever he pleased, when he pleased, and sold for his advantage, as he pleased. In fact, the defence of the conduct of the Defendant, relative to the *Hull* and shares, has been but slightly insisted upon by the defendant's counsel. All that has been urged, on the other hand, is reducible to this argument, viz. the Defendant was, for the reasons already urged, entitled to be considered as the allottee of the extension shares, the disposal of which is complained of by the Plaintiff being so entitled, then these shares in the *Hull and Selby* Railway are no more than the number proportionally allotted to him, in respect of these *East and Riding* Extension shares, which formed part of the general stock and capital of the *York and North Midland* Railway Company. Assuming this argument to be correct, the determination of this question will depend on the decision to which the Court may come, with regard to the former shares. Even if the Court should accede to that view of the case, it is obvious, if my former decision be correct, the Defendant cannot, in respect, be considered as the allottee of the extension shares disposed of by him, but that he must, with reference to them, be considered in the light of the position of the company, who has taken advantage of his position to dispose, for his own benefit, of property of the company, intrusted to him for different purposes for which he must be made to account. And it follows, of necessity, from the same principles and upon the same grounds, which I have already expressed reference to them, that he must be compelled to account for the profit derived by him from the sale of the *Hull* and *Selby* shares, remaining unappropriated in the hands of the company.

The result therefore is, that, in my opinion, the Plaintiffs are entitled to relief, in this suit, on both branches of complaint, and that a decree must be made to this effect:—Declare that the Defendant is a trustee for the *York and North Midland* Railway Company, of the shares in the *East and West Riding* Extension Railways, and in the *Hull and Selby* Railway, disposed of by him, or by his order, in his character of chairman or director of the said company.

Declare that the Defendant is bound to account to the Plaintiffs for all profits derived from the sale and disposal of such shares respectively.

Take an account of all the monies produced by or arising from the sales of all the *East and West Riding* Extension shares, and *Hull and Selby* Railway shares respectively, disposed of by the Defendant, or by his order, or for his use; and in taking such account, the Defendant is to be charged with interest, at 5*l.* per cent. on the sums so received by or paid to him, or to his order, or for his use, from the time when the same and every part thereof were and was received and paid respectively. And in taking such account, the Defendant is to have credit for all sums paid by him to or for the use of the company, in respect of such shares respectively. And he is also to have all just allowances.

Subject to any observations from counsel, as to the mode of carrying the views I have expressed into effect, I am of opinion, that this is the best form of the decree. I must give interest at 5*l.* per cent. against the Defendant, because if my decision be correct, he is a trustee, who has been deriving profit from the property of his *cestuis que trust*. The form also in which I have directed
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the account will render it unnecessary, to give any special directions as to the interest on calls, due in respect of these shares disposed of by the Defendant, but which calls were left unpaid, for some period of time after they had become due. I am also of opinion, that I cannot charge the Defendant with the value in the market of any shares, at the time of the issue, which shall not appear to have been actually sold. If, on taking the account it should appear, that shares have been actually sold for the Defendant, but the exact time when, and the price for which they were sold, cannot be ascertained, in such case it will be proper to fix the Defendant with the average price which the shares bore, during the period within which the sale is ascertained to have taken place.

As the expense of this suit, up to this point, has been principally occasioned by the Defendant resisting his liability to account, he must pay the costs of the suit, up to and including the hearing, but the costs of the rest of the suit will depend upon the result of the account.

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CABLE v. CABLE.

WILLIAM CABLE, by his will, dated in 1829, gave his residuary estate and effects to his executors, upon trust to invest and pay the interest, &c. to his wife, *Maria Cable*, for life, and after her decease, to assign it to his children living at his death [which happened], "*then* and in such case, be directed, that the said stocks, funds, &c. should, from and immediately after his wife's decease, become the property of the person or persons, who should *then* become entitled to take out administration to his effects, as his personal representative or representatives, according to the provision of the statute for the distribution of intestates' effects, and in the proportion pointed out by the said statute, in case he had died intestate and unmarried."

The testator died in 1832 without having any child; his wife survived and died in 1851.

On her death, a question arose, whether under the ultimate limitation in the testator's will, the next of kin at his death, or his next of kin at the death of the tenant for life, were entitled to the residue.

It appeared, that at the death of the testator, his father, *Thomas Cable*, was living, and was his sole next of kin. He died in *May*, 1840, and in 1851, at the death of the widow, the nephews and nieces of the testator were his next of kin.

Feb. 12. A testator bequeathed the residue to his wife for life, with remainder to his children living at his death, and if there should be none (which happened), then he directed, "that immediately after his wife's decease, it should become the property of the person who should *then* become entitled to take out administration to his effects, as his personal representative," according to the Statute of Distribution, and in the proportions thereby pointed out, in case he had died intestate and unmarried." Held, that the next of kin at the death of the testator, and not those at the death of the tenant for life, were entitled.

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Mr. *Taylor* and Mr. *Collins*, for the Plaintiff. The next of kin intended by the testator were those in the proper sense of the term, viz., those at the testator's death, and therefore his father alone became entitled to the residue, *Gundry v. Pinniger* (a). The word "then" means "in that event," and not "at that time."

Mr. *Anderson*, for *Robert Cable*, the administrator *de bonis non* of the testator, took no part in the argument.

Mr. *Lloyd* and Mr. *Rasch*, for defendants, who took the same view as the Plaintiff. The recent case of *Gundry v. Pinniger* is in point; the case of *Birch v. Luckie* (b) is to the same effect. The question is, whether the word "then" is an adverb of time or refers to the event. It is plain, on the authorities, that the latter is the proper construction. The ultimate destination of the residue is limited by the testator, with reference to the supposed event of his own death, "intestate and unmarried;" in which case, his father would have been his next of kin.

Mr. *R. Palmer* and Mr. *Freeling*, for other Defendants. The death of the tenant for life was the period at which the testator's next of kin were to be determined. The case of *Gundry v. Pinniger* is distinguishable from the present. Here the word "then" occurs twice in juxta-position, and must be construed, in the first instance, as meaning "in case," and in the second, as expressive of the time at which the next of kin are to be determined, that is, the death of the widow; *Long v. Blackall*;

(a) 14 *Beav.* 94; 1 *De G.*,
M. & G. 502. (b) 8 *Hare*, 301.

v. Blackall (a); *Jones v. Colbeck* (b); *Say v. Creed* (c); *Holloway v. Holloway* (d); *Butler v. Bushnell* (e). The words "died intestate" have reference to the proportions in which the next of kin are to take.

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Mr. *Collins*, in reply.

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There is more obscurity in this case than in *Gundry v. Pinniger* and the other cases cited; but the safe rule in construing a will is, to adhere, if possible, to the established meaning of words. There is always a difficulty in fixing the death of the tenant for life as the period at which the next of kin of a testator are to be determined, for in so construing it, you must introduce the words, "if the testator had died then;" that is, the sentence must run thus: "to my next of kin, as if I had died at the same time as the tenant for life." I am of opinion, that the word "then" must be construed as an adverb representing an event, and not as an adverb of time; that is, it means "thereupon," and the fund is "thereupon, or in that event, to be distributed in the proportions directed by the statute, as if I had died intestate and unmarried." If I do not so construe the sentence, there is a contradiction between the two members of it; but this construction renders the whole intelligible and clear, whereas if the other be adopted, the fund could not be divided in the same proportions as directed by the statute. This construction has also the advantage of attributing to the expression

(a) 3 *Ves.* 486.
(b) 8 *Ves.* 38.
(c) 5 *Hare*, 580.

(d) 5 *Ves.* 399.
(e) 3 *Myl. & K.* 232.

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pression "next of kin" its natural signification, that is, next of kin at the death of the testator.

The word "unmarried" strengthens this construction, for it seems introduced to exclude the widow, who was otherwise provided for, and would, but for this, be entitled, under the statute, at the death of the testator, but not at her own death.

HARTLEY v. TRIBBER.

Feb. 15.

In the construction of a gift in a codicil, the Court may and must look at the previous will and codicils.

A testator, by his fourth codicil made gifts to *M.*, his wife, and *E.*, their child, and also to a boy, *F.*, and in this codicil he spoke of *E.* and *F.* as "the children," and appointed his wife their

guardian. By the fifth codicil, he bequeathed 4,000*l.* to *M.* "for her own and the children's benefit." The marriage of the testator with *M.* turned out to be invalid. Held, that by the term "children" in the fifth codicil, *E.* and *F.* were meant.

THE testator, by his fourth codicil, dated the 4th of February, 1849, made the following bequest:—
"I hereby give and bequeath to *Marianne Joseph*, now my wife," the sum of 1,000*l.*, &c., "for the benefit of herself and my beloved little *Emily*, our child, to whom I constitute her guardian. And I likewise bequeath to her the further sum of 500*l.*, for the use and benefit of the dear boy *Frederick B. Hartley*, to be used as she shall think fit. And I constitute her guardian to both the children, in full confidence she will discharge the trust faithfully; and I hereby recommend her and these children to the affections of my two sisters, whom she truly

DATES.

1839.	First marriage.	1851.	March 5th. Codicil.
1841.	<i>Emily</i> born.	1851.	April. Miscarriage.
1849.	Aug. Fourth codicil.	1851.	October. Death.
1849.	Dec. Second marriage.		

truly loves. I also request my sister to give her, the said *Marianne*, my wife, the sum of 100*l.*, out of any money which may be in the house, or at my banker's at the time of my decease, for her present expenses of *herself and the children.*"

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By the fifth codicil to his will, dated 9th of *March*, 1851, he expressed himself as follows:—"I hereby give and bequeath to my beloved wife *Maria*" 4,000*l.*, &c., "to be used *for her own and the children's benefit*, as she shall, in her judgment and conscience, think fit."

The ceremony of marriage had been performed between the testator, and the lady mentioned by the testator in the fourth codicil as "*Marianne Joseph*, now my wife," and in the fifth codicil as "my beloved wife *Maria*," first at *Sandgate* in *March*, 1839, but it having been discovered that this marriage was not valid in law, the parties were married a second time, on the 29th of *December*, 1849, at *Calais*, by a clergyman of the Church of *England*; but after the testator's death, this marriage, in consequence of some informality, turned out to be invalid both by the law of *France* and *England*. The parties had, however, lived together as man and wife, from the date of the second marriage till the testator's death, on the 12th of *October*, 1851.

At the date of the fifth codicil, the testator's supposed wife was *enceinte*, and this was known to the testator, but in the month of *April* following she had a miscarriage. The dear *Emily* was born in *November*, 1841, but they had no other child.

As to the boy *Frederick B. Hartley*, it appeared from the evidence, that he was the testator's son by *C. H.*,

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and that some time previously to, and at the date of the fifth codicil, both he and the dear *Emily* were residing with the testator, and that they continued to reside with him till his death. These were the only two children whom the testator recognized or noticed, though he had several other illegitimate children to whom he gave legacies. The testator, in consequence of the invalidity of his marriage, really never had any legitimate children.

The evidence, on behalf of the Plaintiff, *Frederick B. Hartley*, went to show, that he was treated and acknowledged by the testator as (although it did not appear that he was reputed to be) his son, and that he was treated by the testator with the same affection and regard as *Emily*; but the evidence on behalf of the Defendants tended to show, that he was treated by the testator, not as his son, but as his godson.

The Plaintiff *Frederick B. Hartley* filed a claim, to have his rights under the fifth codicil determined, and at the hearing, an order was made, whereby an inquiry was directed, to ascertain who were meant by the words "the children" in the fifth codicil.

The Plaintiff insisted, that, by these words, the testator meant and intended *Emily B.* and the Plaintiff. The Defendants, on the other hand, insisted, that by those words, the testator meant and intended, and could only mean and intend his children then *in ventre sære*, and the other legitimate children that might be born to him, in the same way as if the words had been "children" only, or "our children."

The Master found "that the children meant were, the testator's children by his reputed wife *Marianne*."

To this report, exceptions were taken by the Plaintiff, which now came on to be heard.

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Mr. *Roupell* and Mr. *T. E. Lloyd*, for the Plaintiff, in support of the exceptions, contended, that as the will and the codicils must be taken together, as forming only one testamentary instrument, the fifth codicil must be read in connection with the fourth, and being so read, it was clear that "the children" intended to be benefited by the bequest in the latter, were the same "children" as were mentioned by name in the former, that is, *Emily B.* and *Frederick B. Hartley*; *Sherer v. Bishop* (a); *Fuller v. Hooper* (b); *Crosbie v. Macdoul* (c); *Reeves v. Newenham* (d). They argued, that when legitimate and illegitimate children are mentioned by name in a will, and the word "children" generally is afterwards used, in the same will, it includes the illegitimate children; *Owen v. Bryant* (e); *Meredith v. Farr* (f); *Gill v. Shelley* (g).

Mr. *R. Palmer* and Mr. *Giffard*, *contrà*. The codicils are to be construed separately, and the Court cannot look out of the fifth codicil itself, for the purpose of ascertaining the intention of the testator, or the persons to whom the words "the children" contained therein are applicable. The fifth codicil throws no light upon the subject; and supposing the fourth codicil did not exist, no other children could be intended by the fifth than his legitimate children.

If any meaning can be given to those words, they  
must

(a) 4 Bro. C. C. 55.

(b) 2 Ves. sen 242.

(c) 4 Ves. 610.

(d) 2 Ridg. P. C. 43.

(e) 1 De G., M. &amp; G. 697.

(f) 2 Y. &amp; C., C. C. 525.

(g) 2 Russ. &amp; Myl. 336.

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must be held to mean the testator's children by the lady whom he therein calls his "beloved wife," and who was, or, in the absence of evidence to the contrary, the Court must conclude, was believed by him to be his wife. The lady was his wife at the dates of both codicils, or at least the marriage must be presumed, *Piers v. Piers* (a); but the state of circumstances, at the date of the latter, was entirely different from that at the date of the former, for she was then *enceinte*, as the testator knew. He expected then to have legitimate children (assuming he believed his marriage valid), and he considered his daughter *Emily* legitimate; it follows therefore, that in using the words "the children," simply, he meant his legitimate children. The object in all these cases is, in the first place, to determine the possibility of legitimate children to answer the description, and then, secondly, to see whether the circumstances are such as to lead to the inference, that the term "children" includes illegitimate children. It must appear, however, on the face of the codicil itself, that illegitimate children are intended to be included, and parol evidence of the intention of the testator is inadmissible; *Hart v. Durand* (b); *Swaine v. Kennerley* (c). Even the fact, if it were so, of there being only one child *in esse*, is not a ground for letting in an illegitimate child, especially one of a stranger.

*The MASTER of the ROLLS.*

The question is this:—what is the proper construction of the words "the children" in the fifth codicil. I do not stop to inquire, what would have been the effect and meaning of those words, if they had stood alone

(a) 2 H. Lds. Cas. 33. (b) 3 Anstr. 684. (c) 1 Ves. & B. 469.

alone. The inclination of my opinion is, that they would have been unmeaning, that no one could have taken under those words, if that codicil had stood alone; but I am clear, that the Court may not only look, but is bound to look, at the will and at all the other codicils, for the purpose of explaining any subsequent codicil. Doing so, the meaning of the fourth codicil is too clear to admit of any question whatever. He makes a bequest for the benefit of his wife and his beloved little *Emily our child*, and then he makes a gift "for the benefit of the dear boy *Frederick*." It is not necessary, for the purpose of the construction, that *Frederick B. Hartley* should be any relation of the testator at all. Then he constitutes his wife guardian "to both the *children*;" that means to "our child" *Emily*, and to "the dear boy" *Frederick*. Whether he had the power of constituting her the guardian of another person's child is another question; but this is quite clear, that he intended to do so if he could by law. He then recommends her (his wife) and "these children," that is, *Emily* and *Frederick*, to the affections of his two sisters. And then he proceeds, in the same codicil, to give 100*l.* for the present expenses of "herself and the children;" that is, the two children before-mentioned.

The fifth codicil gives a sum of 4,000*l.* to his wife, "to be used for her own and *the children's* benefit." Why am I to give the word "children," in this fifth codicil, a different meaning to that which it bears in the fourth codicil? He has used the same words, and in my opinion, they mean exactly the same persons in the fifth codicil as they do in the fourth; and whether *Frederick* was his own child or not, I entertain no doubt, that that is the proper meaning of the fifth codicil, and, by this, the case is disembarrassed from any question

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question arising from the argument as to the legitimacy of the children.

I must therefore allow the exceptions.

### FORD v. The Earl of CHESTERFIELD.

Feb. 15, 26.

Rules as to the right of a disclaiming Defendant to costs, in foreclosure suits.

If a disclaiming Defendant shows, that he never had and never claimed any interest, or, having an interest, that he had disclaimed or offered to disclaim before the institution of the suit, he is entitled to his costs. But if, having an interest, he neither disclaims nor offers to disclaim till he puts in his disclaimer, he is not entitled.

These rules prevail, though the Plaintiff never applied to the Defendant to disclaim prior to the institution of the suit.


In a foreclosure suit by second mortgagee, a subsequent judgment creditor, by his answer, disclaimed all interest, and stated, that he had never been applied to by the Plaintiff to disclaim, previously to the filing of the bill; but he did not add, that if he had been so applied to, he would have disclaimed, or that he had never claimed an interest. Held, that he was not entitled to his costs from the Plaintiff.

Where, in consequence of a replication being filed, a disclaiming Defendant is compelled to go into evidence in support of his answer, the Plaintiff must pay his costs, but not otherwise.

THE bill, in this case, was filed by *Ford*, a second mortgagee of certain estates, which had been sold by the Earl of *Chesterfield*, (the first mortgagee,) under a power of sale contained in his mortgage deed. It stated, among other things, that the Defendants, among whom was *Jeffery Ludlam*, claimed to have some interest in or charge upon the property in question, and were, therefore, necessary parties to the suit. The bill prayed that the surplus monies, after satisfying the first mortgagee, might be secured in Court, for the benefit of the Plaintiff and the other parties entitled thereto; that the priorities of the several incumbrances might be ascertained, and the money distributed accordingly. But in case any of the sales were not completed, that the Plaintiffs might be allowed to redeem the prior incumbrances and foreclose the subsequent ones.

*Jeffery*

*Jeffery Ludlam*, a judgment creditor subsequent to the Plaintiff, by his answer said, he did not claim any interest whatever in the monies or hereditaments in question, and he disclaimed all right, &c., thereto. He further stated, that he was never applied to by the Plaintiff to disclaim his rights and interest therein, previously to the filing of the bill, and he asked that the bill might be dismissed against him with costs. He did not, however, add that if he had been so applied to, he would have disclaimed all interest. The question as to the costs of *Ludlam* now came on to be argued.

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Mr. Willcock and Mr. Southgate, for the Plaintiff.

The Defendant, Mr. *Ludlam*, had an interest in the property, and not having disclaimed before the filing of the bill, he was a necessary party to the suit, for the estate could not be released from his claims as a judgment creditor, without bringing him before the Court. The cases of *Silcock v. Roynon* (a) and *Gurney v. Jackson* (b) are at variance with the current of the recent decisions, which, whatever may have been the old practice, have established the rule, that a Defendant is not entitled to his costs, unless he says, not only that he disclaims, but that he never claimed any interest in the matters in question. They cited *Lock v. Lomas* (c); *Grigg v. Sturgis* (d); *Long v. Storie* (e); *Collins v. Shirley* (f); *Appleby v. Duke* (g); *Perkin v. Stafford* (h); *Gibson v. Nicol* (i); *Buchanan v. Greenway* (k); *Ohrly v. Jenkins* (l); *Gabriel v. Sturgis* (m); *Cash v. Belcher* (n).

Mr.

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|-----------------------------|------------------------|
| (a) 2 Y. & C., (C. C.) 376. | (h) 10 Sim. 562,       |
| (b) 1 Smale & G. 97.        | (i) 9 Beav. 403.       |
| (c) 15 Jur. 162.            | (k) 11 Beav. 58.       |
| (d) 5 Hare, 93.             | (l) 1 De G. & Sm. 543. |
| (e) 9 Hare, 542.            | (m) 5 Hare, 97.        |
| (f) 1 Russ. & Myl. 638.     | (n) 1 Hare, 310.       |
| (g) 1 Ph. 272; 1 Hare, 303. |                        |



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Mr. *W. R. E. Forster*, *contra*. The Defendant *Ludlam* would unquestionably have been entitled to his costs, if he had parted with all his interest before the filing of the bill, and by his answer had disclaimed, and stated, simply, that if an application had been made to him before he had been made a party, he would then have disclaimed all interest, *Hiorns v. Holtom* (a). He would also have been entitled to his costs (though having an interest) if, before the filing of the bill, he had offered to disclaim, and by his answer had disclaimed, *Lock v. Lomas* (b). The same rule applies where the Defendant states, by his answer, that no application had been made to him to disclaim, and that if there had been, he would have released and disclaimed all interest, *Gurney v. Jackson* (c). That case is directly in point, and was decided by the Vice-Chancellor upon a review of all the cases, and solely, as appears from a note in the Registrar's book, on the ground, that the Defendant had no notice beforehand of the Plaintiff's intention to file the bill. Now here, a large number of judgment creditors, amounting to about forty-five, have been made parties, and before taking such a step, the Plaintiff ought to have applied to them, and ascertained whether they would or not disclaim. Not having done so, he ought to pay Mr. *Ludlam's* costs.

In *Ablett v. Edwards*, cited in the note to *Perkins v. Stafford* (d), the Plaintiff was ordered to pay to the disclaiming Defendants their costs; and in *Silcock v. Roynon* (e), it was expressly decided, that the Defendants in a foreclosure suit, properly disclaiming, are entitled to their

(a) *Ante*, p. 259.  
 (b) 15 *Jur.* 162.  
 (c) 1 *Smale & G.* 97.

(d) 10 *Sim.* 562.  
 (e) 2 *Y. & C., C. C.* 376.

their costs. In that case, the Defendants, by their answer, stated, that they did not claim, and never had claimed, any interest, and that no application had been made to them, to disclaim before the filing of the bill. That case is similar to the present, and, together with *Gurney v. Jackson* (a) and *Ablett v. Edwards* (b), has restored the old practice, which, as was observed in *Ohrly v. Jenkins* (c) was, that a *puisne* incumbrancer, who, being made a Defendant, disclaimed, should have his costs. The case of *Tipping v. Power* (d); *Collis v. Collis* (e); and *Baily v. Lambert* (f); may be referred to, as having some bearing on this point.

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Again, this is not strictly a foreclosure suit, but one which proceeds upon the footing of the sale already made, and seeks to distribute the proceeds thereof; and the bill prays a sale of any part of the property which may remain unsold under the power of sale.

If the Defendant is not entitled to costs from the Plaintiff, for the reasons already urged, he is on the ground that the Plaintiff has filed a replication, *Williams v. Longfellow* (g).

*The MASTER of the ROLLS.*

Since the case was before me at the hearing, I have looked into the case and authorities. But as I did not like to decide the point, on my own opinion, and it being stated that there were some authorities, and especially a late decision of Vice-Chancellor *Stuart*, which supported

(a) 1 *Smale & G.* 97.

(b) 10 *Sim.* 562, n.

(c) 1 *De G. & Sm.* 543.

(d) 1 *Hare*, 405.

(e) 14 *L. J. (Ch.)* 56.

(f) 5 *Hare*, 178.

(g) 3 *Atk.* 582, and see *Mitford* (4th ed.) p. 319.

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supported the Defendant's view of the case, I have allowed the question to be re-argued.

The result is, that in my opinion, the effect of all the later authorities is this:—First, that in suit for foreclosure or redemption of mortgages, where a Defendant disclaims in such a manner as to show that he never had and never claimed an interest, at or after the filing of the bill, there he is entitled to his costs. Secondly, if a Defendant having an interest, shows that he disclaimed or offered to disclaim before the institution of the suit, there also he is entitled to his costs. Thirdly, that where a Defendant having an interest, allows himself to be made a party to the suit, and does not disclaim or offer to disclaim till he puts in his answer or disclaimer, in the case he is not entitled to his costs.

All the modern authorities are consistent with these rules, and are reconcilable with each other, except the late case of *Gurney v. Jackson* (a), the facts and circumstances of which are not fully stated in the report of it cited; and I am of opinion, that that case does not overrule the general current of authorities.

There is another point to which I must advert, viz., the filing of the replication by the Plaintiff. The rule as to this I take to be this:—that if a Defendant disclaims, and then the Plaintiff replies to the disclaimer, and the Defendant is, in consequence, compelled to go into evidence in support of the statement in his answer, the Plaintiff must pay his costs, but not otherwise. In this case, no evidence has been gone into, and therefore the Defendant is not entitled to his costs.

(a) Since reported in 1 *Smale & G.* 97.

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WAUGH v. WADDELL.

**M**RS. Waddell, a *feme covert*, who was entitled to separate estate, employed the Plaintiff Mr. Waugh, and afterwards Messrs. Waugh and Mitchell, the Plaintiffs, as her solicitors. Having incurred bills of costs, she left them about April, 1849. In July, 1849, she again applied to them to act for her. This they consented to do, on her giving them an undertaking to pay their costs out of her separate estate. Mrs. Waddell, accordingly, on the 18th of October, 1849, signed a memorandum, requesting them to act as her solicitors in certain matters, and the memorandum proceeded thus:—"And in consideration of your so acting as my solicitors, I hereby charge upon and will pay from my separate estate, your former and future bills of costs and the bills of costs of Mr. Waugh, alone, against me, in respect of these and other causes and matters, together with interest at 5*l.* per cent. per annum on those already incurred from this date, and upon those which may be incurred, from the end of every year, in which the business charged for may be performed."

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Where a married woman employs a solicitor and makes her separate estate liable, she is, though not personally liable, a "party chargeable" within the meaning of the 37th section of the 6 & 7 Vict. c. 73.

Pending a reference for the taxation of a solicitor's bill against a married woman, the solicitor cannot maintain a suit to enforce a lien for his bill of costs on her separate estate.

In October, 1851, Mrs. Waddell ceased to employ the Plaintiffs as her solicitors, and on the 15th of December, 1851, she, upon a petition presented without a next friend, obtained the common order for the delivery and taxation of the Plaintiffs' bills of costs. This order was in the usual form, and thereby "the Petitioner submitting to pay what should appear to be due in respect of the said bill," the order for taxation was made, "and it was ordered, that no proceeding at law

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or otherwise be commenced against the Petitioner respect of the said bill, pending such reference" (a).

On the 22nd of *May*, 1852, the Plaintiffs delivered the bills in respect of all matters, except a suit and proceedings in lunacy, as to which an order in lunacy had been made on the 5th of *August*, 1851, for taxation but had not been acted on. Neither party proceeded to the taxation, but on the 26th of *November*, 1852, Plaintiffs filed the present claim, asking, on the foot of their lien under the document of the 18th of *October* 1851, the ordinary relief in cases of mortgage, or if Mrs. *Waddell* might be foreclosed.

Mr. *Roundell Palmer* and Mr. *Greene*, for the Plaintiffs. It will be objected, that this was a security taken by solicitors for future costs, and therefore invalid. That rule, however, was established to protect the client from oppression, in dealings between him and his solicitor, and has no application to a case like the present where it is for the benefit of the married woman to be able to retain a solicitor, upon an understanding agreement that her separate estate should be liable for his costs; for otherwise, no solicitor would act for a married woman against whom there is no personal remedy. In *Murray v. Barlee* (b), it was expressly held, that the mere promise of a married woman to pay her solicitor's costs was binding upon her separate estate though in making the promise, she made no allusion to it. They cited *Owens v. Dickenson* (c); *Lord v. Wigwick* (d).

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(a) See 15 *Beav.* 508.(b) 3 *Myl. & K.* 209; 7 *Sim.* 194.(c) *Cr. & Phill.* 48.(d) 2 *Phill.* 110.

**Mr. Roupell and Mr. Jessell, for Mrs. Waddell.** It does not appear, whether the Plaintiffs claim merely for bills delivered; but taking the claim to be for bills generally, delivered and undelivered, and whether partnership bills or not, then the Plaintiffs proceed upon the footing of a security, which, to some extent at least, is void.

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By the memorandum of *October, 1849*, Mrs. *Waddell* undertakes to pay not only present, but future bills of costs; but as a solicitor is not permitted to take a security for future costs (*a*), the memorandum is, to that extent, void. As to the costs incurred prior to the date of the memorandum, of which no bills have been delivered, no action or suit can be maintained, either at law or in equity, until the expiration of one month from the delivery of the bill of costs (*b*); and if any security has been taken for such costs, it wants the requisite consideration in order to make it available. As to those bills which have been delivered, they have been referred for taxation, and no suit can be maintained, in respect of them, pending the taxation, for the order itself expressly provides, "that the Plaintiffs shall not commence any proceeding, at law or otherwise, in respect of their bill, pending the reference." It is a high contempt of this Court, therefore, to commence any such proceeding, and the Defendant might have moved to commit the Plaintiffs for their disobedience. But further, the 37th section of the Solicitors' Act (*c*) expressly enacts, that upon the application of the party chargeable, the Court is required to refer the bill for taxation, "and the Court or Judge making such reference *shall* restrain such attorney or solicitor, &c. from commencing any action or

(*a*) *Jones v. Tripp, Jacob, 322.*

(*b*) *6 & 7 Vict. c. 73, s. 37.*

(*c*) *6 & 7 Vict. c. 73.*

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or suit touching such demand, pending such relief. The act therefore would be infringed, if the Court not to restrain these Plaintiffs from proceeding on this claim. Mrs. *Waddell* comes within the terms of the act and the order, like any other persons both, the course is, to restrain the solicitor, on application of the party chargeable, which Mrs. *Waddell* in this case, is. If that be not so, still so long an order for taxation stands, no claim or other proceeding can be supported. The authority of *Murray v. E* is not disputed; but it differs from the present, in that the question was, whether, as to the bills delivered to a married woman, her letters to her solicitors as to a contract, in equity, to pay them. As to the present case, it is said, that Mrs. *Waddell* has been in fault, in not proceeding with the taxation, but the party might have proceeded with it, and the Court therefore are equally in fault.

Mr. *Selwyn*, for the husband.

Mr. *R. Palmer*, in reply.

There are three sections bearing on the question of taxation, each relating to a different class of persons. The 37th section applies to the case of a person "chargeable;" the 38th, to one not being so chargeable within the 37th section, but who is to pay;" and the 39th section applies to the case of a "trustee, &c. chargeable," where a party interposes the property out of which the bill is payable making a taxation.

The 37th section of the act has no application to the present case. It applies only to the case of a person "chargeable for such bills:"—to a person against

an action might be maintained for the recovery of the amount, and to one whom the Court would order to pay to the solicitor the amount found due. Unless the Court would order a married woman, personally, to pay the amount of the bill when taxed, there is no foundation for the proposition, that she comes within the meaning of the 37th section of the act. The 37th section deals with the case of an action or proceeding *in personam*. The phrase "party chargeable" implies personal chargeability, and, as Lord *Eldon* says, there can be no personal chargeability on the part of a married woman. It is not known to the law, and no proceeding can be taken, except against her trustees or against her separate property; *Francis v. Wigzell* (a); *Aylett v. Ashton* (b). The summary jurisdiction of the Court, under the act, is one involving a payment, and "the party" is one against whom the Court can make an order to pay, that is, one personally liable. This is clear, from the proviso at the end of the 37th section, which enables the Court to dispense with the prohibition from commencing an action or suit "against the party chargeable therewith," although one month shall not have expired from the delivery of the bill, in case there should be probable cause for believing that "such party" is about to quit England.

The 38th section does not apply to this case, for Mrs. *Waddell* is not "liable to pay," and there is no prohibition in that case against an action or suit by the solicitor against the "party chargeable."

The 39th section would exactly apply to the present case, if the trustees of Mrs. *Waddell* had given an undertaking to pay, and had become "chargeable," and her separate property was primarily liable, but such is not the case.

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(a) 1 *Mad.* 258.

(b) 1 *Myl. & Cr.* 105.



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It is said, however, that the order to tax costs is an undertaking to pay the costs; but this can give no right to the solicitor for the payment of the costs. The Defendant, Mrs. *Waddell*, being a *feme covert* unable to give a valid submission to pay them. Terms of the order are taken from the act, and to which we must refer, in order to ascertain their import; we find that they apply to an injunction against a person *in personam*. This is not a suit for the recovery of the Plaintiffs' "demand," but to establish a lien on property which alone is liable for the payment of costs ascertained; it is not therefore a suit "touching the demand," but for a matter quite collateral.

*The MASTER of the ROLLS.*

I am of opinion, that the 38th section of the *Vict. c. 73*, does not apply to this case, but to the person making the application for costs to tax, is not himself the person employing the solicitor. Nor has the 39th section any bearing on the case. As to the 37th section, it does not, in relation to a married woman personally, because she is not "party chargeable," in that sense; but it does apply to her, when, as in this case, she has given an undertaking to pay the costs out of her separate estate, her separate estate is therefore chargeable. This is shown down in *Murray v. Barlee* (a). I think, therefore, that the 37th section does apply to a married woman whose separate estate is chargeable; and if so, that secures an end to the whole matter, for it prohibits the solicitor from commencing any action or suit till or until after delivery of the bill; and after it has been

(a) 3 *Myl. & Keen*, 209; 7 *Sim.* 194.

and referred for taxation, it restrains him from taking proceedings pending the reference.

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At first, I thought this was a claim simply to establish the Plaintiffs' lien for their costs, as against the separate estate; and regarding it in that light, I might have directed it to stand over, until after the taxation had been completed and the sum due to the Plaintiffs had been ascertained, but I am of opinion, that the claim goes further, and ought not, therefore, to have been filed at all. It must, consequently, be dismissed with costs, but without prejudice to any proceeding which the Plaintiffs may be advised to institute, after the amount of their bill of costs shall have been ascertained on taxation.

## JONES v. GREATWOOD.

Feb. 17.

**CHARLES GREATWOOD**, by his will, bequeathed to trustees the sum of 1,000*l.* assured on his life, upon trust to invest the same, and to pay the interest, dividends and proceeds thereof to his wife, *Sarah Greatwood*, "during the term of her natural life, in case she should so long remain his widow and unmarried, for her own use, and to enable her to bring up, maintain and educate his children, during their respective minorities;" and from and after the decease or second marriage of his wife, the testator gave it to his two daughters, and afterwards to their children. And as to all the rest, residue and remainder of his real and personal estate and effects, the testator gave, devised and bequeathed the same to his said trustees, upon trust to permit his wife to have, hold and enjoy the same,

A testator gave the residue of his estate to trustees, upon trust to permit his wife to receive the rents, issues and profits, and carry on his trade for her own benefit, and to enable her to bring up, maintain and educate his children, *durante viduitate*. Held, that the wife was absolutely entitled to the business.

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same, and receive and take the rents, issues and profits thereof, and carry on any trade for her own use and benefit, and to enable her to bring up, maintain and educate his children, during the term of her natural life; in case she should so long continue his widow and unmarried; "and after her decease or second marriage, to sell and invest, for the benefit of his children, as therein mentioned."

The testator died in 1837. His wife proved his will, and continued the testator's business upon his house of trade in *Birmingham*. In 1847, the house was taken by a railway company, under the powers of their act, who paid 5,700*l.* for the house, and 2,600*l.* for compensation for loss of business. In this administration suit, the only question, on further directions, was, to whom the compensation for the business belonged, under the trusts of the will.

Mr. Roupell, Mr. Rogers, Mr. Dean and Mr. Speed, for the different parties.

The MASTER of the ROLLS thought the widow was entitled to the business, entirely for her own benefit, and therefore that she had a right to dispose of it for herself.

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## GODDARD v. LETHBRIDGE.

**THIS** was a claim filed by Miss *Sarah Goddard*, against the executors of Sir *T. B. Lethbridge*, her brother in law, to have a sum of stock replaced, which stock or its proceeds had been lent by her to Sir *T. B. Lethbridge*. The claim (the allegations of which were supported by the Plaintiff's affidavit) stated, that in *September*, 1816, the Plaintiff, who had 5,000*l.* three per cent. consols and 5,000*l.* three per cent. reduced annuities then standing in her name, was requested by Sir *T. B. Lethbridge* to lend him 6,000*l.* worth of the stocks, at their then price, either by selling so much as would produce 6,000*l.* cash, or by transferring into his name 6,000*l.* worth of the stock. That in consideration of her doing so, he undertook, when required, to replace and reinvest in the Plaintiff's name, so much of the stocks, as, at the time of the advance to him, it would be necessary to sell, in order to produce 6,000. The Plaintiff assented, whereupon Sir *T. B. Lethbridge* wrote her a letter containing this passage :—" I have seen my friend and adviser, Mr. *Leigh*, and he has filled out a bond from me to you, which, in case of accident to me, will be your security for the 6,000*l.* you have been so obliging as to lend me, and which I will undertake to replace in the 3*l.* per cents, whenever you may wish it, and in the meantime, to pay half-yearly into your banker's hands, full 5*l.* per cent. interest. You will, therefore, only have to order your broker to sell out your stock, or rather to transfer the same into my name, when I will pay him all interest due upon the same, up to the day of the transfer, as

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In 1816, *A.* transferred 10,000*l.* three per cents. to *B.*, which he sold, and after retaining 6,000*l.* repaid the surplus to *A.* Concurrently, *B.* gave to *A.* a bond, conditioned for the repayment of 6,000*l.* and five per cent. interest, and he wrote to *A.* engaging to replace the 6,000*l.* in the three per cents. In 1822, *B.* admitted his obligation to restore to *A.* the stock sold out. The Court, in 1852, considering that the contract was for restoring the stock, and that *A.* had not the option of taking stock or money, held that the contract was not usurious.

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well as the surplus sum, over and above the 6,000l., which you can invest again or not as you think proper, so that any payment of interest to you will commence from the day of transfer."

The bond referred to by the letter was a money bond, dated the 31st of *August*, 1816, in the penal sum of 12,000l., conditioned to be void on payment to the Plaintiff of 6,000l. and interest, at 5l. per cent. per annum, on the 22nd of *February* then next. It was prepared by the solicitor of Sir *T. B. Lethbridge* and delivered to the Plaintiff, who had no legal advice or assistance on the occasion.

On the 25th of *September*, 1816, the 5,000l. consols were accordingly transferred into Sir *T. B. Lethbridge's* name, and on the 6th of *October*, Sir *T. B. Lethbridge* wrote the Plaintiff a letter, which contained this passage:—"I have heard from *Drummonds* to say that 6,000l. consols was transferred from your name to mine. I have ordered them to sell it, and the amount, of course, I shall send you an account of, and which, when the other sum is transferred, will, taken together, be the consideration for the bond I gave you, and the overplus of the 6,000 paid into your banker's hands."

The 5,000l. three per cent. reduced were transferred into the name of Sir *T. B. Lethbridge*, on the 20th *November*, 1816, and the two sums were sold and produced altogether 6,268l. 15s., of which Sir *T. B. Lethbridge* retained 6,000l. for his own use, and he paid over 268l. 15s., being the surplus, to the Plaintiff.

On the 28th of *February*, 1822, Sir *T. B. Lethbridge* having forgotten the terms of the arrangement, and imagining that he could discharge his obligation by paying 6,000l.

100*l.* sterling, wrote to the Plaintiff, to say, that she
 at either take less interest, or accept her 6,000*l.* lent.

On being reminded by the Plaintiff of the facts of
 case, he wrote to her a letter, dated 2nd *November*,
 2, in which he stated, that he had not the least
 reflection of the price of stocks, at the time of the
 offer to him, but finding their rise in price to be so
 great as the Plaintiff had stated, he was sorry he had
 failed to the subject at all, and he added, "until I can
 give you the same quantity of 3 per cents, which you
 to accommodate me, I shall insist upon paying you
 4 per cent., otherwise you would actually suffer a loss
 by your kindness to me; and I earnestly request, that
 the debt from me to you may stand as it has done,
 and I can place you in the same situation as you before
 did, with regard to the 3 per cent. stock." Sir *T. B.*
Lethbridge continued to pay interest at 5 per cent. down
 to his death, which took place on the 17th of *October*,
 1853.

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The Plaintiff claimed to have the two sums of 5,000*l.*
 4 per cents, after deducting the 268*l.* 15*s.*, replaced; but
 this should be refused, then she claimed 6,000 and
 interest.

Mr. Roundell Palmer and *Mr. Kinglake*, for the
 Plaintiff.

Mr. Roupell and *Mr. Piggott*, for the Defendant (the
 executor of Sir *T. B. Lethbridge*). The letter of Sir
B. Lethbridge, stating that he would replace the
 stock when required so to do, coupled with the money
 paid for 6,000*l.* in cash, gave the Plaintiff, in effect, an
 option to have either the stock or the money. The case
 falls

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falls within the decision in *Barnard v. Young* (a), in which it was held, that such an option rendered a contract usurious. If such an option is, in effect, given, though not so expressed, the result will be the same as if it had been expressed. The parties, without intending it on either side, have entered into an usurious contract, the Plaintiff holding a security for 6,000*l.* advanced by her, and, at the same time, having an option of requiring Sir *T. B. Lethbridge*, to replace so much stock, in case of a rise in their price.

Forrest v. Elwes (b); *White v. Wright* (c); *Hodgkinson v. Wyatt* (d), were cited.

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I think that the contract between these parties is reasonably clear. It is to be observed, that this was not a contract between two strangers, or the case of a party advancing money to a person in distress, but was a contract between two near relatives or connexions. I am of opinion, that this lady was not to have her option of taking the money or the stock, and that if the price of stock had fallen, and Sir *T. B. Lethbridge* had replaced the 3 per cents. in her name, this Court would not have allowed her to sue upon the bond for the 6,000*l.* sterling. I entertain no doubt, that the real contract was, to restore the stock when required, and accordingly, I think the Plaintiff is entitled to have it replaced. It was, however, very proper for the executors to bring this question before the Court.

(a) 17 *Ves.* 44.
 (b) 4 *Ves.* 492.

(c) 3 *Bar. & Cr.* 273.
 (d) 9 *Beav.* 566.

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WALLACE v. ANDERSON.

THIS was a claim, filed on the 8th of *August*, 1851, by the assignees of a bankrupt, for payment of the income of a fund held in trust for the maintenance and benefit of the bankrupt and his issue.

By a settlement dated in 1838, and made after the marriage of *Benjamin B. Blackwell* and *Ann* his wife, a freehold estate was conveyed to two trustees, upon trust for *Benjamin B. Blackwell* until he should become bankrupt or insolvent, or should otherwise cease to be entitled, by his own act or by operation of law, to the personal enjoyment of the said estate or the receipts of the rent and profits thereof. And in case *Benjamin B. Blackwell* should become bankrupt or insolvent, or should otherwise cease to be entitled to the said premises, under the aforesaid trust, then, during the joint lives of him and his wife, upon the trusts therein mentioned, and upon further trust, that if he should survive his wife, then upon trust, that the said trustees should, during the remainder of the life of *Benjamin B. Blackwell*, from time to time, pay and apply and dispose of the said rents and profits, in such manner, for the maintenance and support, or otherwise for the benefit of the said *Benjamin B. Blackwell* and his issue by the said *Ann Blackwell*, as the trustees should think proper.

Feb. 19. Under a marriage settlement, trustees were, after the bankruptcy of the husband and the death of the wife, to pay the income "in such manner, for the maintenance and support or otherwise for the benefit of the husband and the issue," as they might think proper. Held, that the discretionary power of the trustees, as to the application of the income, was not taken away by the bankruptcy, so as to entitle the objects to take equally. An inquiry was directed as to what had been properly applied for the maintenance of the issue, and the assignees were declared entitled to the surplus.

Ann Blackwell died in 1844, leaving one child, *John R. Blackwell*.

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In 1850, *Benjamin B. Blackwell* was declared bankrupt, and the Plaintiffs were appointed his assignees.

The Plaintiffs, the assignees, alleged, that the Defendants, the trustees, had received considerable sums on account of the estate, and they prayed that their rights to the rents, during the life of the said *Benjamin B. Blackwell*, might be ascertained and declared, and for an account of the rents since the bankruptcy, and that the trustees might pay them one moiety, or such other part as they might be entitled to.

In 1852, the child, *John R. Blackwell*, died without issue, and the Plaintiffs filed a supplemental claim, claiming the whole of the subsequent rents.

The income of the estate was about 100*l.* a year, and the trustees had applied the greater part of it for the maintenance of *John R. Blackwell* until his death.

Mr. *Jessel*, for the Plaintiffs. The question may be limited to the right of the assignees to a moiety of the rents during the life of the child of the bankrupt. After the bankruptcy, the trustees could not exercise the powers for maintenance, &c. vested in them in favour of the bankrupt. All that the Court would allow them to do would be, to divide the income between all the parties interested in equal shares. This was done by Lord *Langdale* in *Rippon v. Norton* (a), which is precisely in point.

Mr. *Lloyd* and Mr. *Faber*, for the trustees. A special trust was created, after the bankruptcy of the husband

(a) 2 *Beav.* 63.

band and the decease of the wife, to pay, apply and dispose of the rents and profits in such manner, for the maintenance and support, or otherwise for the benefit of the husband and his issue by his said wife, as the trustees should think proper. What was intended for the bankrupt, therefore, was not property of the bankrupt which could pass to his assignees, but the benefit of a special discretion to be exercised in his favour, under the absolute control of the trustees. In *Twopeny v. Peyton* (a) a testatrix had first given a share in a fund to her nephew; and, on his becoming bankrupt, she revoked the bequest, and directed her trustees to apply the whole, or such part of the interest of the share for his maintenance and support, and for no other purpose, as they, in their discretion, should think most expedient. The Vice-Chancellor of *England* held, that it was impossible to apply the interest of the share in any way not comprehending the maintenance and support of the bankrupt, and that the interest did not pass to the assignees. Again, in *Kearsley v. Woodcock* (b) the assignees took nothing but what was not required for the support and maintenance of the bankrupt, his wife and children; and in *Lord v. Bunn* (c) it was held, that such a discretion and power, given to trustees, was not taken away by the husband's insolvency.

The interval between the bankruptcy and the death of the infant was about two years, and the trustees, who have not applied the whole of the income, and have a small balance in hand, are ready to account for it.

Mr. *Jessel*, in reply. The case of *Kearsley v. Woodcock*, in which *Rippon v. Norton* was cited, is distinguishable

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(a) 10 *Sim.* 487. (b) 3 *Hare*, 185. (c) 2 *Y. & C. C. C.* 98.

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guishable from the present case, for there the trust was as for the benefit of such of them, the bankrupt, his wife if and family, or otherwise, as the trustees should think proper; and it was held, that though he had no separate interest, yet any interest the bankrupt might have in the fund, after such portion as should be found not applicable to the support of his wife and children, passed to the assignees. *Rippon v. Norton* is therefore left untouched by that case. The effect of holding that the discretion of the trustees, in such a case, is taken away, is not the same as saying, that no such power can exist, but only that its exercise would be a violation of the bankrupt laws.

The power is a trust and cannot be exercised to the exclusion of any object of it, and whatever ought to be given by the trustees to the bankrupt, the assignees would be entitled to. Here, the trustees have given the bankrupt nothing, but they have increased his allowance for keeping his child. They have, in fact, exercised no discretion at all, as to the amount for maintenance, and they had no power to give anything after the bankruptcy. If, however, the Court should think they had a discretion, the Plaintiffs are entitled to inquiry, as to what part the assignees ought to have, and as to the *bona fides* of the trustees in their application of the income.

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I am not satisfied, that the point which has arisen in the present case was argued in *Rippon v. Norton*. To say that the discretion of the trustees, as to the application of the income, was gone by the bankruptcy, is to say, that it never arose, and the object of the trust would

would thereby be defeated. I am not sure that the Court would not, in a case like the present, follow the rule laid down in *Kearsley v. Woodcock*. I shall therefore direct an inquiry, as to what sums have been properly applied by the Defendants, the trustees, for the maintenance, support and benefit of the infant child of the bankrupt, during his life, and there must be a declaration, that the Plaintiffs are entitled to the balance of the net rents not so applied, and to the whole rents since the death of the infant. There must be an account of the receipts of the trustees on this footing.

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TRIMMELL v. FELL.

**B**Y indenture of settlement, dated 5th July, 1844, Mr. and Mrs. *Hutton*, under a joint power, vested a sum of 1,300*l.* consols in trustees, in trust to pay the dividend to Mrs. *Hutton*, during the joint lives of herself and Mr. *Hutton*, for her separate use. And from and immediately after the determination of the aforesaid trust in favour of the said *Frances Hutton*, for the joint lives of herself and the said *R. Hutton*, in case the same trust should determine by the death of the said *R. Hutton*, then the said trust monies, &c., were to be in trust for Mrs. *Hutton*, her executors, administrators and assigns absolutely. But in case the said trust should determine by the death of the said *Frances Hutton*, then the dividends, &c., were to be paid to *R. Hutton* for life, and after his decease, the said trust property, &c., was to be held in trust for such persons, as Mrs. *Hutton* should, by will, notwithstanding coverture, appoint; and in default, in trust for such persons as should be of her blood and kin under the Statute of Distribution.

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Trust funds were limited to a married woman absolutely if she survived her husband, but, if she predeceased him, she was to have a general power of appointment by will. The wife survived her husband. Held, that the power had not arisen, and that, therefore, her will, made during the coverture, was inoperative.

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Distribution. Mrs. *Hutton* made her will, dated the 1st of November, 1845, whereby, in exercise of every power enabling her, she appointed and devised all the real and personal estate, to which she was then and at the time of her death might be seised, possessed or entitled, of which she had power to dispose of by that her will, unto trustees, upon trust for her husband for life, and after his decease, upon trust to sell and pay 600*l.* to *Julia*, the wife of *Peter Frederick Robinson*, and invest the residue for her daughter *Caroline Fell* for life, with remainder to her children.

In 1848, Mr. *Hutton* died leaving Mrs. *Hutton* surviving, and who afterwards died, without having republished or revoked her will of 1845. In January, 1852, administration with the will annexed was granted to the Plaintiff, of the chattels, &c., of Mrs. *Hutton*, limited to such personal estate, as, by the settlement of 1844, she had a right to appoint or dispose of. In February, 1852, *Caroline Fell* took out administration to the residue of the goods, chattels and credits of her mother. The main question between the parties was, whether Mrs. *Hutton's* will was valid and operative, as to the 1,300*l.* consols comprised in the settlement of 1844, notwithstanding she survived her husband.

Mr. *Lloyd* and Mr. *Rogers*, for the Plaintiffs, (the trustees of the settlement of 1844,) stated the case.

Mr. *Roupell* and Mr. *Shebbeare*, for the Defendants *Fell* and wife. The power given to Mrs. *Hutton* by the deed of 1844, was only to arise in an event which never happened, namely, in case of the determination of the trust in favour of Mrs. *Hutton*, by her death in her husband's lifetime. This event not having happened, the power never arose, for it was only to come into operation

upon the happening of that event and not otherwise. It was intended to give her, during the coverture, a testamentary power, which would restrict the rights of her husband by survivorship; but it was not necessary to give her such a power, in the event of her being the survivor, for being then a *feme sole*, she had the capacity of making a will, independently of any such power. Strictly speaking, she could only make a will as a *feme sole*, for a testamentary instrument, executed by a married woman during coverture, in exercise of a power, though it purports to be a will, is not, properly speaking, a will, but an appointment; Mrs. *Hutton* exercised her power during coverture, but in the event which has occurred, her power never arose, and the appointment is inoperative, *Price v. Parker* (a). She ought to have republished the testamentary instrument after the death of her husband, and then it would have constituted a valid will, in the ordinary sense, and have operated on the property in question, which would then have passed under it, for she had then an absolute interest in it.

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Mr. *R. Palmer*, for the legatee, *Peter Robinson* and wife, and Mr. *E. F. Smith* for the children of Mr. and Mrs. *Fell*.

This will is valid and effectual, and operates on the 1,300*l.* consols. The settlement, in substance, gave her a power of appointment by will, with an absolute interest in default of its execution. There is no substantial difference between this case, and that in which a power is given to a married woman to appoint by will in the ordinary way. In *Dingwell v. Askew* (b), a married woman, having a power by will to

(a) 16 *Sim.* 198.(b) 1 *Cor.* 427.

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to appoint stocks, made her will during coverture, appointing it. She survived her husband and afterwards had the stock transferred into her own name. The Court held, that this did not operate as a revocation, and was "very clearly of opinion" that "this property would pass by this will." This case was followed in *Clough v. Clough* (a). [*The MASTER of the ROLLS.* The difficulty here is not whether the will is revoked, but whether the power ever arose at all.] The will was valid in its inception, as an execution of a power to be exercised by her during the joint lives of herself and her husband; it continued valid down to the death of her husband, and was not rendered void by that event. After becoming discovert, Mrs. *Hutton* was justified in treating it as she did, as a valid will without republication. *Morvan v. Thompson* (b), and several of the old authorities, are at variance with *Price v. Parker*. In *Morvan v. Thompson* (b), the settlement was in effect this:—that if the wife died before the husband, the sum of 700*l.* was to be paid, on his death, to such persons as she by will should direct. If she survived him, then the 700*l.* were to be paid to her. She made a will in 1807, her husband died in 1819, and she died in 1820; and Sir *John Nicholl* was of opinion, that the will "remained valid after the husband's death."

They also cited *Doe d. Collins v. Weller* (c); *May v. Roper* (d); *Goodrick v. Shotbolt* (e).

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The first question must be answered in the negative.

I entertain

(a) 3 *Myl. & K.* 296.

(b) 3 *Hagg. Ecc. Rep.* 239.

(c) 7 *Term R.* 478.

(d) 4 *Sim.* 360.

(e) *Proc. Ch.* 333.

I entertain no doubt, that where an estate or a sum of money is vested in trustees, for a married woman for life, and afterwards to the use of such persons as she should by will appoint, she would, upon surviving her husband, acquire the absolute interest in the property, and that the fact of her so surviving and acquiring the absolute interest in the property, would not, of itself, affect any previous disposition, by will, she might have made; and if nothing more happened, the appointees in her will would take the money, exactly in the same way as if she had died during the coverture. The present, however, is a very different case, and I can best explain my view by the following illustration:—If a sum of money or an estate were settled upon a married lady for life, for her separate use, and the settlement provided, that in case she should survive her husband, it should go to her absolutely; but in case she should die before her husband, then it should go to *A. B.*; I entertain no doubt, that *A. B.* would only take in the event specified, viz. in the case of her dying before her husband. The same thing would happen if the limitation, in case she died before her husband, was to her children, or to such of them as she should appoint by deed, and none could take except in the event specified, of her dying in the lifetime of her husband. What difference is there, if, instead of there being a special and limited power of appointment amongst a specific class by deed, it is a general power of appointment amongst any persons by deed, or among a general class of persons by will?

What is done by this settlement is this:—The trusts are to arise in favour of certain specified objects in one event, namely, in case she survives her husband. In that case she is to take the property absolutely. But in

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in the other event of not surviving her husband, other trusts are to arise, in favour of a totally different class of persons. The settlement is precise and clear upon the subject. In case the aforesaid trust in favour of the wife for the joint lives of herself and her husband should determine *by the death of the wife*, then such persons shall take, as she should, by will, appointing that is to say, this class of objects are only to take in that event. This, I apprehend, is the principle of the decision in *Price v. Parker* (a), which is neither inconsistent with nor militating against the decision in *Dingwell v. Askew*; and it appears to me, that if I were to hold the contrary in this case, I should be reversing all that class of decisions in respect to estates and interests limited to arise only upon the happening of a specified contingent event. Neither does it appear to me that I am, in the slightest degree, overruling the case of *Morvan v. Thompson* (b). The expressions in that case are ambiguous; the Judge speaks of the effect of the settlement, and the exact words not being set out, it is impossible to tell, whether the fund was limited upon a particular set of trusts, to arise in the event of the death of the wife before the husband. In my opinion, this is not the case of a general testamentary power, given to a married woman during coverture, which may be considered as continuing upon her surviving her husband, and when she has a general testamentary power by operation of law. But the testamentary power is here given to the wife, as a donee of the power, and is merely a power of appointment, and in no way differs, in this respect, from a power to be executed by deed in a given event. It is, in fact, a trust in

(a) 16 Sim. 198.

(b) 3 Hagg. Ecc. Rep. 239.

in favour of certain specified persons, which is only to arise upon the happening of a particular event, which has not happened. If the event had occurred, then, and then only, was she at liberty to specify the objects, but as the event has not happened, the power has not arisen, and she cannot specify them. I am of opinion, therefore, that the first question must be answered in the negative.

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COLLARD v. SAMPSON.

THIS was a suit for specific performance.

Thomas West, by an indenture dated 4th June, 1835, conveyed the property in question to three trustees, to hold the same upon such trusts as he (*Thomas West*), during his life, by any deed or deeds, writing or writings, under his hand and seal, to be attested by two credible witnesses, should direct, limit and appoint, and in default, upon other trusts therein mentioned.

Thomas West made his will, dated the 17th of February, 1849, which was duly executed and attested, as required by the Wills Act (a), but was not sealed, as required by the power. By this will, he devised and appointed his messuages, &c. to trustees for sale.

The surviving trustee sold the property in question to the Defendant, who refused to complete his purchase, on the ground that the will was not a valid execution of the power to appoint by writing under hand and seal.

Upon

Feb. 21, 22.

Held, by the Master of the Rolls, governed by the case of *Buckell v. Blenkhorn* (5 Hare, 131), that a will, not sealed but executed according to the formalities of the last Wills Act, was a due execution of a power required to be executed by writing, under hand and seal. But, held by the L. Js. that the title was too doubtful to force on a purchaser.

(a) 1 Vict. c. 26, s. 9.

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Upon a reference as to the title, the Master reported that a good title could be made. To this report exceptions were taken, which now came on to be heard.

Mr. *R. Palmer* and Mr. *T. H. Terrell*, for the Plaintiffs. The power was duly executed by the will, though not under seal. Before the 1 *Vict.* c. 26, a will was held to be a "writing" within the terms of a power required to be executed by any writing (a), and that act did not alter the rule of construction, but merely regulated the solemnities with which a will was to be executed. The act provides (b), that no appointment by will, in exercise of a power, shall be valid, unless signed in the presence of two witnesses subscribing the will; and every will executed in such manner (c), "shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required, that a will made in exercise of such power, should be executed with some additional or other form of execution or solemnity." *Buckell v. Blenkhorn* (d) supports this view of the case, and is exactly in point.

Mr. *Roupell* and Mr. *W. H. Browell*, for the Defendant. The formalities of a power are, no doubt, by the act dispensed with, where the power is expressed to be executed by will; but in this case, in the instrument creating the power, no mention is made of a will. Before the Wills Act, where a power was to be executed "by any writing" under seal, execution by will was considered a sufficient compliance with the terms of the power, because

(a) *Kibbet v. Lee, Hobart*, 312; *Countess of Roscommon v. Fowke*, 6 B. P. C. 158; *Doe d. Delegal v. Holloway*, 1 Stark. 431; *Edwards v. Edwards*, 3

Mud. 197; *Jacob*, 335.

(b) Sect. 9.

(c) Sect. 10.

(d) 5 *Hare*, 131.

because a will duly sealed was considered "a writing under seal." The act, however, applies only to a will strictly as such, and not to an instrument whose efficacy, as an execution of a power, depends on its being an instrument under seal. The interpretation of the act in *Buckell v. Blenkhorn* cannot be supported. A good title, therefore, cannot be made, and at any rate it is no doubtful to force upon a purchaser.

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I must affirm the Master's finding. The decision in *Buckell v. Blenkhorn* surprised me at the time, and though in favour of my client, it differed from the opinion I then entertained upon the case. Before the late Act, it was well settled, that a will under seal would be a good execution of a power to be executed by a writing under seal, but I entertained great doubts, whether, since the act, a will without a seal could be held to be a good execution of such a power. However, as *James Wigram* has determined, that such a power may be executed by will without seal, I think it better, whatever doubt I may have entertained, to decide in conformity with that case, rather than on my own judgment.

Besides, that decision was made in 1846, and has ever since been doubted, and several transactions may have taken place in reliance upon its authority; nay, his very will, made in 1849, may have been executed by the testator upon its authority, and on the belief that an execution of the power by will, without seal, could be a valid execution. Though I entertain great doubts on the point, I cannot reverse the decision of

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Sir *James Wigram*, but must hold that the will was of good execution of the power.

Exceptions overruled

NOTE.—On appeal, the Lords Justices thought the title too doubtful to force on a purchaser. (*June 4, 1853.*)

PRINCE v. COOPER.

Feb. 22.

The 55th section of the statute 15 & 16 *Vict. c. 86*, is applicable only to cases in which, for the protection of property or other like cause, it is necessary to apply to the Court for a sale, and it was not intended to enable parties, in a contested suit, to obtain, upon an interlocutory application before the hearing, a decision upon the questions in contest.

UNDER the trusts of the marriage settlement of Mr. and Mrs. *Cooper*, a freehold estate was to be sold, and the produce was to be held on certain trusts. Mrs. *Cooper* was dead, and, under her will, the Plaintiffs and others were (subject to the life estate of her husband, and other charges) entitled in remainder. The Plaintiffs instituted this suit, challenging the conduct and character of the trustees, seeking the administration of the trusts, and stating, that Mr. *Cooper* was in possession, and had the principal management of the property, a considerable part of which had been disposed of, and a small part only remained. There were also complaints as to timber felled on the estate, an account of which, and also of the rents and profits of the property, had been refused. On these grounds, the Plaintiff, before the hearing, moved for an order for a sale of the estate, under the 15 & 16 *Vict. c. 86* (a).

Mr. *Roupell* and Mr. *Haynes*, for the Plaintiffs, in support of the motion. The object of the suit is the administration

(a) Sect. 55.

administration of the estate; and under the settlement of 1832, there was an absolute trust for sale and conveyance out and out. Under the circumstances of the case, it will be for the benefit of all persons interested, to anticipate the time of sale, and have the property sold immediately.

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Mr. *Bovill* and Mr. *Giffard*, for the trustees, and the representatives of the deceased trustee, *contra*, were not admitted.

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The section of the act referred to does not apply to a case as this. If it did, the effect would be, that the cause would be heard twice over. The act is intended to apply only to those cases, in which, for the protection of the property or other like cause, it is necessary to come to the Court; but not to enable a party, in a pending suit and upon an interlocutory application, to have the hearing of the cause, to obtain a decision upon the main questions at issue in it.

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COYLE v. ALLEYNE.

Feb. 23, 28.

If a Defendant in contempt files his answer without paying the costs of his contempt, the Plaintiff is entitled to have his further answer taken off the file.

The time for excepting to a Defendant's answer runs from the filing of the answer, and not from the time when the costs of the contempt are paid.

THIS was a motion to take the Defendant's answer off the file, on the ground that he had not, before he filed it, paid the costs of his contempt.

The Defendant's answer had been found insufficient, and he, not having put in his further answer, was arrested under an attachment, but liberated on bail. On the 12th of *January*, he filed a further answer, and, on the same day, obtained an order of course, for the taxation of the costs of the contempt, and upon payment, for his discharge from his contempt. The costs were taxed, but not paid. The Plaintiff thereupon moved, that the Defendant's answer might be taken off the file, or that the Plaintiff might be at liberty (if so advised) within fourteen days after the Defendant should have paid the costs and cleared his contempt, to refer back the answer on the former exceptions, and that the Defendant might be ordered to pay to the Plaintiff the taxed costs of the contempt.

Mr. *Roundell Palmer* and Mr. *G. L. Russell*, in support of the motion, said, that its real object was, not to disturb the answer, but to have fourteen days for referring it back on the old exceptions, after the Defendant should have paid the costs and cleared his contempt; for that unless this motion was granted, the time for excepting might elapse; *Sidgier v. Tyte* (a); and, by excepting to the answer before payment of the costs of contempt, they would be waived.

Mr.

(a) 11 Ves. 202.

Mr. *Rogers*, *contrà*. This motion is contrary to the practice, for a Defendant cannot obtain an order to clear his contempt until he has actually put in his answer. The time to except begins to run from the period when the Plaintiff is bound to accept the answer; that is, I admit, from the time the costs are paid. The Plaintiff, therefore, can be put to no inconvenience, because the time to except would run from the Defendant's clearing his contempt, and not from the time of filing his answer; *Nedby v. Nedby* (a); *Haynes v. Ball* (b); *Smith v. Blofield* (c); *Sidgier v. Tyte* (d). In this case, the Plaintiff is not bound to accept the answer, until the costs are paid; and there is no authority to the contrary. The answer is now regularly filed, and ought not to be taken off the file. The Plaintiff should have moved to discharge the order of the 12th of *January* to clear the contempt; for the costs have, under that order, been taxed, but are not ordered to be paid immediately.

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I have made inquiries as to the practice of the Court, and I have ascertained, and have no doubt, that the practice of the Court is correctly represented in *Sidgier v. Tyte*. I am of opinion, from the account I have received, that the correct practice is this:—If a Defendant being in contempt files his answer, and then refuses or neglects to pay the costs of the contempt, the Plaintiff is entitled to an order to take his answer off the file, with costs, upon a motion for that purpose; and if, for any reason, the Plaintiff fails to have the answer taken

(a) 8 *Sim.* 334.
(b) 5 *Beav.* 140.

(c) 2 *V. & B.* 100.
(d) 11 *Ves.* 202.

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taken off the file, or if he accepts the costs, the time for excepting runs from the period of filing the answer, and not from the time when the costs are paid. If the Court were now to allow the Defendant's answer to remain on the file, on payment of the costs of the motion and of the contempt, I have no doubt that the time for excepting must be directed to run from the time the costs are paid. In this case, therefore, unless some arrangement is come to between the parties, the answer must be taken off the file, and the Defendant must pay the costs of the motion.

I at first thought, that the answer ought not to have been filed until the costs had been paid, but I find the practice is not so.

GRAHAM v. GRAHAM.

March 1.

A testator appointed his wife sole executrix, and he made her and A. trustees. By a codicil he revoked the appointment of his wife as executrix, on the ground that "the duties were too arduous for a lady," and he appointed A. B. and C.

JAMES B. GRAHAM, by his will, after bequeathing some legacies, and appointing his wife sole executrix of his will, gave the residue of his real and personal estate to his wife and *William Lewis*, the heirs, executors, &c., upon trust to sell and pay the income of a moiety to his wife for life, and the residue upon trusts for the benefit of his infant son and others. He gave to the surviving or continuing trustee power to appoint new trustees. The fourth codicil to his will dated the 26th *July*, 1850, was as follows:—"I hereby revoke the appointment of my wife as executrix, and appoint A. B. and C. executors in trust of his will." By another codicil, he referred to his having revoked the executorship, and to having appointed A. B. and C. executors. Held, that the revocation was confined to the office of executrix only.

The appointment of a new trustee under a power, pending a suit for administration, is not necessarily invalid.

the appointment of my wife *J. G.*, as *executrix* said will, as I consider the duties thereof too for a lady to perform. I leave and bequeath y executors hereinafter named, the sum of ach, as a small compensation for the trouble ll be put to in executing their trusts. I nomi-d appoint *William Lewis*, *William G. Graham*, *Owen Poole*, *executors in trust* of my said will, and aral codicils thereto."

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ie fifth codicil to his will, after reciting that he ointed his wife *Jane Graham*, sole executrix but by one of his said codicils he had revoked ointment, and had appointed in her place *Wil-. Graham*, *William Lewis* and *Owen Poole*, as rs of his will, and reciting, that as some doubt rise, whether such codicil might not revoke the made to his said wife, the testator thereby de-that in case the said codicil, or any other will or theretofore executed by him, should have re-such bequest to his said wife, it was then his n to revive the same, and he hereby directed, that ustees" named in the will should pay to his said e moiety of the income of his general residuary or her life, without power to anticipate the same.

am Lewis, one of the trustees named in the id also one of the executors appointed by the codicil, died on the 29th of *August*, 1850, and ator died on the 12th *October*, 1850. His will dicils were proved by the surviving executors, *G. Graham* and *Owen Poole*.

he 12th *December*, 1852, the testator's widow, he power in the will, appointed *Richard Morris* ee of the will, to act in conjunction with her.

The

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The surviving executors filed a claim for the administration of the estate, and the cause coming on for further directions, and upon a petition for a transfer by the executors, to the widow and *Richard Morris*, of the residuary estate, a question arose, whether the revocation of the appointment of Mrs. *Graham*, as executrix, and the substitution of the plaintiffs and *William Lewis* as "executors in trust" in her place, operated as a removal of the former from, and an appointment of the latter to, the office of trustee.

Mr. *Roupell* and Mr. *Lewin*, for the Plaintiffs. The three persons appointed "executors in trust" by the 4th codicil, were thereby constituted both executors and trustees of the will, and the testator has completely blended the two characters. The reason assigned by the testator for the removal of his wife from the executorship is, "because the duties are too arduous for a lady to perform." This shows, that he must have had the office of trustee as well as that of executor in his contemplation, for the duties of a trustee are much more "arduous" than those of an executor, and the appointment of the three persons as "executors in trust," coupled with the removal of the widow from the executorship, is inconsistent with her continuing a trustee. The acceptance by the surviving "executors in trust" of the office of executor is an acceptance by them of the office of trustee, *Mucklow v. Fuller* (a).

Mr. *Temple* and Mr. *J. H. Palmer*, for Defendants interested under the contingent limitation over, contended, that the Plaintiffs were trustees as well as executors, and that new trustees ought not to have been appointed

(a) *Jac.* 198.

appointed under a power, however clear, pending a
Webb v. Earl of Shaftesbury (a).

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Mr. *R. Palmer* and Mr. *Cairns*, for the petitioners, attended that the trusteeship of the widow had not been revoked, and in regard to this appointment of a trustee *pendente lite*, they urged, that, in the absence of allegation or proof to the contrary, the Court would presume, that the trustee had properly exercised the power of appointing a new trustee. They cited *Cafe Bent (b)*; *Buxton v. Buxton (c)*.

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[I have no doubt about the construction of this will. It is said that the testator has mixed up the two characters of trustee and executor; but his will and his codicils show, that he knew the difference between the functions of an executor and a trustee, for, by his will, he first appoints an executrix, and afterwards trustees. By the 4th codicil, he revokes the appointment of executrix, and appoints three persons as executors in trust, and by the 5th codicil, he recites that he had revoked the appointment of his wife as "executrix," and had appointed the three persons "in her place" and "as executors of his will;" and to remove all doubts as to revocation of any benefits given to his wife by his will, he directs his trustees to pay the income of a moiety of the residue to her.

The revocation of the office of executrix, therefore, is confined to the office of executrix, and does not extend to that of trustee; and, unless there is some cause

(a) 7 Ves. 480. (b) 3 Hare, 245. (c) 1 Myl. & Cr. 80.

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cause shown, to control the power of the surviving trustee to appoint a new one, the power must be held to have been rightly exercised by such surviving trustee.

THE ATTORNEY-GENERAL v. SALKELD.

March 1.

An information in respect of parish land was filed against churchwardens nominatim, and not in the mode pointed out by the 59 Geo. 3, c. 12, s. 17. Before the hearing they were changed. Held, that the Court was not prevented making a decree.

THIS information was filed by the Attorney-General against *Ralph Salkeld* and *Emanuel Killett*, the churchwardens of the parish of *St. Giles*, in the county of *Durham*, in their individual character, for an account and a scheme for the management of some charity property called "the *Gillegate Church* property," situated in the parish, and to inquire as to the validity of certain leases thereof, and for the appointment of new trustees. The information alleged, that the property was held by the churchwardens, in trust for certain charitable purposes; that the origin however of the charity was unknown, but that the rents or some parts thereof had been applied in the repairs of the parish church of *St. Giles*.

The Defendants, by their answer, filed on the 22nd of *November*, 1852, alleged, that the property, ever since they could hear, had been treated as belonging to the parish of *St. Giles*, and the rents as applicable to the repairs of the church, and for any other purposes for which a church-rate was raisable and applicable, by the churchwardens, or by the churchwardens and sidesmen, or by the churchwardens and overseers of the parish for the time being, and they submitted to the Court, whether by

Geo. 3, c. 12 (a), the freehold and inheritance the property were not vested in the church- and overseers of the parish of *St. Giles*, as a orate.

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perty has been let from time to time, at rents fixed and agreed upon by the parishioners of n vestry assembled, but never by the church- f their own authority.

efendants remained churchwardens down to *July*, 1852, when they both went out of office, *Ed* was reappointed with *Edward Sinclair*, made the customary declaration nor entered fice, but no one had been appointed in his

H. Terrell, in support of the information.

yd and Mr. *Faber*, for the Defendants. The n is improperly framed in respect of parties, churchwardens and overseers of the parish, official body, ought to have been made parties icial capacity, and not as individuals, by name. no existing trustees of the property, but the dens and the overseers have the property them as a corporate body, under the 59 *Geo.* and ought to be sued in the mode thereby t (*a*). The rents have always been applied by the

s section, the church- overseers shall and ' in the nature of a te, for and on behalf , all buildings, lands uments belonging to " and in all actions, relation thereto, " it ficient to name the

churchwardens and overseers of the poor, for the time being, de- scribing them as the churchwar- dens and overseers of the poor of the parish for which they shall act, and naming such parish;" and no suit is to abate by their deaths or removal from office.

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the churchwardens towards the repairs of the parish church, which shows the nature of the original trust.

Mr. *T. H. Terrell*, in reply. To some extent it is true, that the churchwardens and overseers are "in the nature of a body corporate," and the property may be vested in them as a corporate body; but the question is, whether, as such, they were capable of suing and of being sued. They could not answer as a corporation, under their corporate seal, for they have none. The act of parliament gives them special powers to hold land, but there is no instance of churchwardens being made Defendants as a corporate body, except in special cases, where they have been made a corporation. Many cases however, exist, in which a supplemental information has been filed against succeeding churchwardens, and this shows that they are not a full and complete corporation.

The following cases were cited. The churchwardens, &c. of *St. Nicholas, Deptford* v. *Sketchley* (a); *Doe* d. *Jackson* v. *Hiley* (b); *Doe* d. *Higgs* v. *Terry* (c); *Rumball* v. *Munt* (d); *Ex parte Annesley* (e); *Alderman* v. *Neate* (f); *Allason* v. *Stark* (g); *Attorney-General* v. *Lewin* (h); *In re Paddington Charities* (i).

*The MASTER of the ROLLS.*

The best course will be to make a decree in the form proposed, and to direct the churchwardens and overseers

(a) 8 Q. B. Rep. 394.  
 (b) 10 Barn. & Cr. 885.  
 (c) 4 Ad. & Ell. 274.  
 (d) 8 Q. B. Rep. 382.  
 (e) 2 Y. & C. 350.

(f) 4 Mee. & W. 704.  
 (g) 9 Ad. & Ell. 255.  
 (h) 8 Sim. 366.  
 (i) 8 Sim. 629.

to be served with notice of the proceedings in numbers, but the costs of one attendance only to be added to the Defendants. The present churchwardens to arrange as to who shall attend. Practically, the plaintiff is the Defendant in this case (a).

(a) *Reg. Lib.* 1852, A, fol. 597.

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### JACOBS v. JACOBS.

THE testatrix, by her will, dated in 1818, directed the whole of her property to be invested, and the income paid to her daughter *Fanny Samuel*, for life, but in the event of her marrying (which did not happen), gave her 400*l.* only, and the residue was "then to be equally divided between her son *Abraham Samuel*, son in law *Henry Jacobs*, or to their heirs, in such manner as they might deem proper; they, however, first giving 20*l.* each" to two grandchildren. But in the event of her daughter remaining unmarried (which happened), and, after her demise, she directed the whole of her property to "be equally divided between her son *Abraham Samuel*, and her son-in-law *Henry Jacobs*, or to their respective heirs, in such manner, however, as they respectively might deem proper, they or their heirs first giving unto her two grandchildren 25*l.* each.

March 7.  
Bequest to *A.* for life, and, after her decease, to *B.* or his heirs, in such manner as he might deem proper. *B.* died, without appointing, before *A.* Held, a gift, by substitution, to the next of kin of *B.*, at his death, and not at *A.*'s death, according to the Statute of Distributions, as tenants in common and in the proportions fixed by the statute.

The testatrix died in 1821, and *Henry Jacobs* died in 1825 without appointing, leaving a widow and seven children.

*Fanny Samuel* died on the 4th September, 1852, and questions arose as to whom the moiety given to *Henry Jacobs* now belonged.

The questions for the opinion of the Court were, first, whether



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whether this moiety vested absolutely in *Henry Jacobs*, upon the death of the testatrix, and on his death passed to his executors, or whether (no appointment being made) it vested in the parties designated as his "heirs."

Secondly, whether under the word "heirs," the heir at law or the next of kin were entitled. And whether the next of kin were those under the Statute of Distributions, or the next of kindred or blood (excluding the widow). And whether the class was to be ascertained at the death of *Henry Jacobs*, or of the tenant for life.

Thirdly, whether the next of kin took as tenants in common, in the proportions prescribed by the statutes, or as joint tenants.

Mr. *Whaley*, for the widow and the children of *Henry Jacobs*, other than his heir and residuary legatees. This is a gift of the residuary estate to one for life, and after her decease to another person, or his heirs, and is a form of bequest which has been the subject of adjudication, in many cases. It has never been construed as an absolute gift in the legatee, in case of his death before the tenant for life, but, by reason of the alternative word "or," as importing a gift over to the heirs, by way of substitution; *Girdlestone v. Doe* (a); *Salisbury v. Petty* (b).

The objects of the gift over are here designated by the word "heirs," a term which in equity is construed with reference to the nature of the subject of the gift; and in this case, the gift being *pure personalty*, it must be taken to mean next of kin; *Gittings v. M'Dermott* (c);

*Vaux*

(a) 2 Sim. 225.

(b) 3 Hare, 86.

(c) 2 Myl. & K. 69.

*Vaux v. Henderson* (a); *Doody v. Higgins* (b); *De Beauvoir v. De Beauvoir* (c); *Evans v. Salt* (d). As to the next of kin, entitled to take in this case, it cannot, after the late decisions on the subject (e), be successfully maintained, that they are to be fixed at any other time than the death of *Henry Jacobs*, which is the natural period for determining a man's next of kin. The only remaining question is, as to whether they take as joint tenants, or as tenants in common; but if the next of kin take under the gift to "heirs," they must take the fund in the mode pointed out by the Statute of Distributions, namely, as tenants in common.

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**Mr. Jessel**, for the heir at law and the residuary legatees of *Henry Jacobs*. There is a peculiarity in this case which distinguishes it from all the cases hitherto decided, in which there has been simply a gift to *A. or his heirs*. Here, a power of appointment among the "heirs" is superadded. Now if the word "heirs" be taken to mean "next of kin," how can that construction be reconciled with the power to *Henry Jacobs*, to appoint to some of a class who could only be determined after his death? The gift in the first clause, to *A. or his heirs*, is by no means clear, but the second part of the clause, giving a power to appoint among a class, defines and limits the objects of the prior gift, and shows that the word "heirs" cannot mean "next of kin," but must be construed as pointing to some one who could be ascertained in the lifetime of *Henry Jacobs*, and that the word "heirs" is used in the ordinary sense, as importing the party who takes by natural succession,

(a) 1 *Jac. & Walk.* 388.

(b) 9 *Hare*, app. xxxii.

(c) 15 *Sim.* 163; 3 *H. of Lds.* Cas. 524.

(d) 6 *Beav.* 266; and see *Hayes v. Hayes*, 6 *Law J. (Ch.)* 141.

(e) See 14 *Beav.* 94; 15 *Beav.* 275.

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succession, namely, the heir at law; *Mapp v. Clarke*(a); *Ware v. Rowland*(b). If the Court cannot see a clear intention to give the property to the next of kin, then it must go to the party designated by the word "heir," in its proper sense.

The MASTER of the ROLLS.

I have no doubt that the gift of a moiety of the residue to *Henry Jacobs* or his heirs, is a gift by substitution to the person or class designated as his heirs, in the event, which happened, of the legatee dying in the lifetime of the tenant for life; and this being a gift of personal estate, "heirs" must mean next of kin. Any other construction would overrule a long stream of authorities, and the words "in such manner as they may respectively deem proper," do not, in my view, seriously affect the construction to be put upon this bequest.

I am of opinion, therefore, that the next of kin, according to the statute, of *Henry Jacobs*, at the time of his decease, are entitled, and that they take as tenants in common, and in the proportions fixed by the statute (c).

The costs must come out of the general residue.

(a) 3 *H. of Lds. Cas.* 524. (c) *Reg. Lib.* 1852, A, Col.
 (b) 2 *Phill.* 635; 15 *Sim.* 587. 628.

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The Dean and Chapter of ELY *v.* GAYFORD and Others.

THIS suit was instituted by the Plaintiffs against a number of tenants and occupiers to recover certain tithes (*a*). One of the Defendants had died, and there was no legal personal representative of him. The Plaintiffs now moved, under the provisions of "The Act to amend the Practice and Course of Proceeding in the High Court of Chancery" (*b*), for an order appointing the widow to represent the estate of the deceased Defendant, for all the purposes of the suit, and the proceedings consequent thereon and incident thereto.

March 8, 15.

The person who would be appointed administrator *ad litem*, is the most proper person to be nominated under the 15 & 16 Vict. c. 86, s. 44, to represent a deceased party who has no personal representative.

This enactment extends even to those cases where the party "interested" is sought to be made liable.

The statute 15 & 16 Vict. c. 86, s. 44, empowers the Court, when any deceased person who was "interested in the matters in question has no legal personal representative," to proceed in the absence of a representative, "or to appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court shall think fit."

Mr. *Fleming*, in support of the motion.

Mr. *Eagle*, *amicus curiæ*, suggested, that this section did not apply to a case, in which it was sought to make the deceased party's estate liable, but only where he was beneficially

(*a*) See The Dean and Chapter of *Ely v. Bliss*, 5 Beav. 574.

(*b*) 15 & 16 Vict. c. 86, s. 44.

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beneficially "interested in the matter in question."
Groves v. Lane(a), was referred to.

The MASTER of the ROLLS thought that the 44th section of the act was applicable to the present case, and that the person appointed to represent the estate ought, as nearly as possible, to be the same as would have been appointed administrator *ad litem*. He, however, directed the case to stand over, to give him an opportunity of consulting the other Judges.

March 15. *The MASTER of the ROLLS.*

In this case I expressed my opinion at the hearing of the motion, that an order ought to be made, but the matter stood over, in order that I might, before I finally decided, consult the other branches of the Court, and see if they concurred with me in that opinion.

The application was to appoint some one to represent the estate of one of the deceased tenants of property in a tithe suit. I thought the proper person to appoint was the widow, and she being served, I expressed my opinion to that effect, but I desired it to stand over, thinking it desirable to consult the other branches of the Court. Having done so, the order may now be made on both the motions made by Mr. *Fleming*, to appoint the widow to represent the deceased party, under the 44th section of the act.

(a) 16 Jur. 1061.

1853.

PAYNE v. LITTLE.

Feb. 22.

March. 8.

THE original bill in this case was filed on the 12th of October, 1848, by Mrs. *Payne*, a married woman, by her son *Charles H. Payne*, as her next friend, to establish sundry breaches of trust against a Defendant. One of the Defendants by his answer suggested, that her children were necessary parties to the suit, and by amendment, *Charles Henry Payne* was made a Defendant. On the 25th February, 1851, proceedings were stayed in the suit, until a new next friend should be appointed in lieu of the Defendant *Charles H. Payne* (a). On the 22nd of July following, an order was made, that *E. W. Harvey*, a new next friend, should be substituted, and that *Charles H. Payne* should give security to answer the Defendant's costs incurred up to the date of the amendment (b). Upon this order, the parties went into the Master's office, when the Master directed, that *Charles H. Payne* and a surety for him should each enter into a bond for 400*l.* respectively. The surety proposed was objected to, on the ground that he was not a man of substance, and affidavits were read in support of that allegation. The surety himself swore, not that he was worth 400*l.*, but that he considered himself competent to become surety for that amount. The Master refused to accept his security, and the present application was, that *Charles H. Payne* might be allowed to give his own individual security, or that the bond of the proposed surety, as prepared

A. B. was ordered to be substituted for *C. D.* (a Defendant) as the next friend of the Plaintiff, and *C. D.* was ordered to give security for costs up to that time. Held, that the proper security was the bond of *C. D.* and of a responsible surety.

An objection as to the nature and amount of the security for costs required by the Master, held to be properly taken by motion and not by exception.

(a) See 13 *Beav.* 114.(b) See 14 *Beav.* 647.

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notwithstanding the objection.
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Mr. *W. Morris*, in support of the motion, contended, that no additional security beyond that of the personal liability of the next friend himself ought to be required. That the Master had exceeded the directions of the Court, by requiring a surety, and that the amount fixed by him was unreasonably large. He said that there was no case to be found analogous to the present.

Mr. *Lloyd* and Mr. *Bagshawe*, for some of the Defendants, contended, that the next friend did not get rid of his liability for costs by being made a Defendant. That it was clear, that the Court intended something more, by the order, than the mere security of *Charles H. Payne* himself, who was already liable, and the Master himself thought, upon the construction of the order, that a surety and bond to the amount stated were required. That, besides, the application was irregular, the proper course in such a case being, to except to the Master's report.

Mr. *Roupell* and Mr. *Speed*, for other parties.

The MASTER of the ROLLS.

I think the proper course in this case was to proceed by motion, and not by exceptions to the Master's report.

The Master is the proper judge of the amount of security to be taken, and the only question is, whether, on the change of a next friend by order of the Court, it is the practice to take the bond of a surety as well as the bond of the next friend himself, to secure the costs then incurred. I shall not now dispose of the
case,

, but allow it to stand over until the next seal, to
ple me to ascertain what the practice is.

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have made inquiries as to the practice, and have
mined the cases bearing upon the point, and am of
ion, that the Master was right in requiring the bond
surety as well as that of the next friend. I cannot
ense with the bond, and therefore cannot accede to
motion.

FULLFORD v. FULLFORD.

April 30.

MUEL FULLFORD by his will, dated in 1830, devised all his freehold and leasehold
s, &c. to his wife for life, and after her decease, to
nd every his children, then born or thereafter to be
, *who should be living at his death*, as tenants in
non in fee, with cross remainders between them.

the testator bequeathed the residue of his per-
al estate, upon trust for all his children *who should
iving at the time of his decease*, in equal shares and
ortions, with benefit of survivorship and accruer.

y a second codicil to his will, dated in 1849, the
ator changed one of his executors and trustees, and
after
ship had relation to the testator's death, and not to the date of the will, and
the representatives of the deceased child took nothing under the 1 Vict. c. 26,

Devise and be-
quest to all
the testator's
children living
at his decease
(without nam-
ing them).
A subsequent
codicil con-
firmed the
gift, as men-
tioned in his
will, "to his
surviving
children"
(naming them
all). One
died in the
testator's life-
time, leaving
children who
survived the
testator. Held,
that the sur-

1853.

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 v.
 FULLFORD.

after giving certain legacies, he proceeded in these words:—"And I confirm my said will and also the gift of my residuary real and personal estate and effects, as mentioned in my said will and first codicil, to my *surviving* children whose names are not mentioned in my will, namely, *Edward Fullford, William Fullford, Henry Gregory Fullford, James Fullford and Elizabeth Fullford.*" At the death of the testator, in 1852, four of these children were living, but *Henry Gregory* had died, leaving two children who were living at the testator's death. Two other children had died between the date of the will and the second codicil.

The Will Act (a) being applicable to this case, the question was, whether the share of *Henry Gregory* had lapsed by his death in the testator's lifetime, notwithstanding he left issue living at the testator's death. The Plaintiff insisted that the four children living at the testator's death alone were entitled.

Mr. *R. Palmer* and Mr. *Cottrell*, for the Plaintiff. The object of the second codicil was simply to confirm the testator's will, and the mere circumstance of naming the existing children showed no change in the testator's intention, for he confirms it, and assigns as his reason for the variation, that he had not named them in his will. By the will, it is quite clear, that those children only, who were living at the time of his death, were entitled to take, and the survivorship in the codicil is the same as that mentioned in the will.

Mr. *Lloyd* and Mr. *Morris* for the representative of *Henry Gregory Fullford*. No inference can be drawn from

(a) 7 Will. 4 & 1 Vict. c. 26, s. 33.

from the confirmation of the testator's will by his second codicil, for he thereby made several alterations in his will. The words "surviving children" have reference to the time at which the codicil was written, and mean the children then living, whom the testator specifies by name, he having lost *two* in the interval. It does not mean children who should be living at the testator's decease, which would be a very strained construction. Looking at the great length of time (nineteen years) which elapsed between the dates of the will and codicil, and considering the state of the testator's family, their condition in life and wants (four of them having attained twenty-one), it is clear, that his intention was, to give the residue to his "*then* surviving children," whom he mentioned by name; the gift, therefore, to *Henry Gregory*, who died before the testator, leaving issue at the testator's death, takes effect.

1853.

Fullford
v.
Fullford.

The MASTER of the ROLLS.

Upon the will alone there is no question who were the persons intended to take. It is a clear gift of the freeholds to all the testator's children "who should be living at his death;" and the residue of the personalty is given in similar terms. With respect to the codicil, if the gift in it were distinct and clear, it would be unnecessary to look at the will, but the codicil refers to, and is merely confirmatory of the will; it is a referential and not an independent substantive gift. The testator speaks of the property "as mentioned in my will," and of the objects as his "surviving children." The word "surviving," taken by itself, is no doubt ambiguous, and might possibly mean "then surviving," but taken in connection with the rest of the codicil and the will, must, I think, be construed to mean "surviving when I die."

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FULLFORD

v.

FULLFORD.

die." I am of opinion, that the codicil does not affect the will, but leaves the gift in the will as it was, and that the class intended were those children only who were living at the testator's decease.

FORSTER v. MENZIES.

May 9.

A Defendant, resident out of the jurisdiction, had given a general power of attorney to a solicitor to act for him. The Court ordered substituted service on the solicitor of an order to revive, and thereupon gave the Plaintiff leave to enter an appearance, and made a general order, that service of all proceedings on the solicitor should be good service.

THE suit having abated, the Plaintiff, on the 23rd of February last, obtained an order to revive, under the provisions of the 15 & 16 Vict. c. 86, s. 52. On the 22nd of March, the Plaintiff obtained an order for substituted service of the order to revive upon the solicitor of the Defendant *Mary King*, who was out of the jurisdiction, and had given him a general power of attorney to act for her. The order to revive was duly served on the solicitor accordingly; but no appearance having been entered for the Defendant, the Plaintiff now moved, under the provision of the act 15 & 16 Vict. c. 86, s. 52, and the 29th General Order of the 8th of May, 1845 (a), for liberty to enter an appearance for her.

Mr. *Archibald Smith*, in support of the motion. There is no specific provision made by the act for the present case; the Court must therefore act upon its general jurisdiction, and enable the Plaintiff to enter an appearance for the Defendant, in the same way as if the Defendant were here. He referred to *Zulueta v. Vinent* (b).

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This is not exactly the case of *Zulueta v. Vinent*, the question being, whether substituted service within the jurisdiction, on a party out of it, is a sufficient ground for an order empowering the Plaintiff to enter an appearance

(a) *Ord. Can.* 294.(b) 3 *Macn. & G.* 246.

for the Defendant. I am of opinion, that the Defendant is entitled to the order which is asked. It is served on the solicitor in the same way as the Plaintiff. I also think, that the Plaintiff is entitled to a general order, that service of all proceedings upon the same person shall be good service on the Defendant (a).

(a) *Reg. Lib.* 1852, A, fol. 830.

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HARMER v. PRIESTLEY.

was a suit for the redemption of a mortgage of certain freehold property, and the only question at the hearing was one of costs. The mortgage was made in 1832, and had become vested in the mortgagees, and the Plaintiffs were entitled to the equity of redemption of the property.

Defendants, by notice, demanded payment of the
 re money, and stated their intention, in default
 ment, to sell the property.

On the expiration of the notice, the Plaintiffs were to pay the sum due on the mortgage, which they had estimated amounted to about 557*l.* 3*s.* 3*d.* The Plaintiffs applied to the Defendants to receive that sum of money, and to deliver up the title deeds required for the purpose of disposing of the property, which they had advertised for sale. There being some difference of opinion as to accounts, a correspondence ensued, which produced no useful result, and ultimately, on the 2nd of February 1853, the solicitor of the Plaintiffs wrote to the Defendants, saying, the money was lying idle, and that there was any difficulty in ascertaining what was due, they would pay a sum sufficient to cover the amount, and

May 9. Where a mortgagor makes an unconditional tender to the mortgagee of a sum, and the mortgagee refuses to accept it, he does so at his own peril; and if the amount tendered was all that was due, the mortgagee must bear the costs of a subsequent suit for redemption.

the

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the Defendants could send the statement at their leisure. This being declined, the Plaintiffs' solicitor, on the 18th of *March* last, tendered both to the Defendants and their solicitors, 570*l.* for principal, interest and costs, being, according to his calculation, a sufficient sum for that purpose. The tender being also refused, the Plaintiffs filed their claim for redemption.

Mr. *W. M. James* and Mr. *G. L. Russell*, in support of the claim. The Plaintiffs are entitled to a decree for redemption, with a special direction as to costs. Being ready to pay the amount due, they tendered to the Defendants the sum they believed to be then owing and it was the duty of the mortgagees to receive it and also to have their accounts ready to show the amount really due. Their default has occasioned the litigation, and they ought, therefore, to pay the costs of suit. They cited *Harvey v. Tebbutt* (a); *Shuttleworth v. Lowther*, cited in *Detillin v. Gale* (b); *Wilson v. Cluer* (c); *Roberts v. Williams* (d); *Smith v. Green* (e).

Mr. *R. Palmer* and Mr. *Osborne*, for the Defendants, argued, that a mortgagee was entitled not only to principal and interest, but to the costs of a suit for redemption.

The MASTER of the ROLLS.

The question raised is, whether the usual decree for redemption is to be made, or a special direction is to be given as to costs, in consequence of the tender made to the Defendants by the Plaintiffs. The circumstances connected with the tender to the mortgagees, about which

(a) 1 *Jac. & Walk.* 197.
 (b) 7 *Ves.* 586.
 (c) 4 *Beav.* 214.

(d) 4 *Hare*, 129.
 (e) 1 *Coll.* 555.

which there appears to be no dispute, are these:—The Plaintiffs, being desirous of disposing of the property, proposed to pay a gross sum of money, and wait for a settlement until the account was rendered; and they accordingly, after some correspondence, actually tendered to the Defendants 570*l.*, the sum considered to be then due; this the Defendants declined to receive.

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The first question, which usually arises in cases of this description, does not arise here, viz., the question of notice. It is not disputed that a mortgagee is entitled to notice; and I am of opinion, that when the time fixed by the notice expires, the mortgagee is bound to know the amount due to him, and if that sum or a sum calculated by the mortgagor to be the probable amount of principal, interest and costs be tendered to him, unconditionally, he is bound to accept it. A mortgagee is not bound to accept payment without proper notice given to or by him; but if, after proper notice, the amount is tendered to him, and he refuses to accept it, he does so at his own peril.

In *Harvey v. Tebbutt*, Sir Thomas Plumer lays it down, that a mortgagee is not, in all cases, entitled to his costs; and in *Shuttleworth v. Lowther*, the mortgagee was even held bound to pay costs. In *Wilson v. Cluer*, a mortgagee in possession being found, on taking the account, to have been overpaid, costs were given against him. So in *Roberts v. Williams*, the sum tendered to the mortgagee before suit being greater than the balance found due, he was ordered to pay the costs; and in *Smith v. Green*, the mortgagee was deprived of his costs. In all these cases, there was a dispute as to the amount, but upon its appearing, that the full amount had been received by or tendered to the mortgagee, the Court held, that he was not justified in compelling

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compelling the mortgagor to institute a suit for the purpose of taking the account.

A mortgagee is, no doubt, favourably looked on by the Court; but he will not be allowed, by disputing the account, to throw the expenses of an unnecessary litigation upon the mortgagor. In this case, I am of opinion, that there has been an unconditional tender to the Defendants of a sum, which they might either accept or refuse at their own peril. There must therefore be decree for an account of what was due for principal interest and costs on the 18th of *March* last; and if the amount found due should not exceed 570*l.*, then the Defendants must pay the costs of the suit, but if the amount should exceed that sum, then there will be the usual decree as to costs as if there had been no tender.

CHANCE v. CHANCE.

March 11.

A testatrix appointed a trust fund to two trustees, in trust to pay the dividends to *A.* for life, and after his decease, she gave the dividends to two others, *B.* and *C.*, for life; and after the decease of the survivor, she gave, bequeathed, willed and directed the principal to be divided into two parts, and one of them to be "transferred or paid" to the children of those two persons respectively at the age of twenty-five years. Held, that the gift to the children was void for remoteness.

BY a settlement made in 1799, certain property was settled upon trust for *Jane Lodge* for life, with remainder as she should by deed or will appoint.

In the year 1809, the property was taken by Commissioners under the powers of an Act of Parliament. The purchase money was invested in 1,369*l.* 13*s.* 4*d.* consols, and the dividends paid to *Mrs. Lodge* for life.

Mrs. Lodge, by her will, bequeathed to her son *George Chance* and *H. Howard* the 1,369*l.* 13*s.* 4*d.* consols,

and one of them to be "transferred or paid" to the children of those two persons respectively at the age of twenty-five years. Held, that the gift to the children was void for remoteness.

consols, in trust to pay the dividends to *Stevens Chance* for life, and, after his decease, the testatrix gave the interest and dividends to her sons *Charles Chance* and *George Chance*, equally, and the whole to the survivor, during their and his lives and life; and after the death of the survivor (she proceeded), "then I give and bequeath, and will and direct, the principal sum of 1,369*l.* 13*s.* 4*d.*, 3*l.* per cent. consolidated annuities, to be divided into two equal half parts or shares, and one such half part or share to be *transferred or paid*, unto and equally divided between all the children of my said son *Charles Chance at the age of twenty-five years*, with all interest and dividends thereon. And if there shall be but one child, then the whole to such only child in manner aforesaid." The testatrix then bequeathed the other moiety to the children of her son *George Chance* in the same terms, and directed, that if *Charles Chance* should not have any children who should live to attain the age of twenty-five years, the first-mentioned moiety should go the children of *George Chance* in manner aforesaid. *George Chance* survived *Stevens* and *Charles*, and died in 1847. The children of *Charles* now claimed the fund, but the Plaintiff insisted on the invalidity of the appointment to the children at twenty-five, and claimed the whole, as in default of appointment, under the ultimate limitation in the settlement.

Mr. *R. Palmer* and Mr. *Williams*, for the Plaintiff. There is no gift, except in the direction to pay after the deaths of the tenants for life, to a class at twenty-five. It is therefore too remote, and consequently void; *Southern v. Wollaston* (a); *Hunter v. Judd* (b).

Mr.

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(a) *Ante*, p. 166.

(b) 4 *Sim.* 455.

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Mr. *Lloyd* and Mr. *Rogers*, for the children of *George Chance*, claimed one moiety of the fund. They cited *Saunders v. Vautier* (a); *Hanson v. Graham* (b); *Leake v. Robinson* (c); *Leeming v. Sherratt* (d); *In re Bartholomew's Trust* (e); *Harrison v. Grimwood* (f).

Mr. *Henry Stevens*, for the four surviving children of *Charles Chance*, contended, that there was an immediate gift to them. That the testatrix, after separating the fund, gave it to the trustees of her will; and then "willed and directed" the payment of it at twenty-five. That this therefore was an immediate gift, with a postponement of the time of payment.

Mr. *Hanson*, for the Commissioners.

*The MASTER of the ROLLS.*

I am of opinion that the legacies in this case did not vest in the children. The Court endeavours, no doubt, to construe a gift as vested, if it can, but the authorities are numerous and conclusive, that where a gift is made to a class, on condition of their filling a particular character, it can only vest in case that condition is satisfied. If a legacy be first given to a person, and the condition added relates only to the time of its payment, as at a particular age, that is good; but if there be no gift, except in the direction to pay at a particular age, the legatee must attain that age before the legacy vests in him; and if that age be too remote, the gift is void. That is the principle of *Hunter v. Judd* (g). Cases have occurred

(a) *Cr. & Ph.* 240.

(b) *6 Ves.* 239.

(c) *2 Mer.* 363.

(d) *2 Hare*, 14.

(e) *16 Sim.* 585; *1 Macn. & Gor.* 354.

(f) *12 Beav.* 192.

(g) *4 Simons*, 455.

curred where interest being given in the meantime on the legacy (as in *Hanson v. Graham*), it has been held vested. So if (as in *Saunders v. Vautier*) the legacy has been separated from the bulk of the testator's property, it has also been held vested. I have looked at this case, to see if there were any circumstance to take it out of the general rule, but I do not find any one of the grounds of exception. I thought at first, that it was given to the trustees, and therefore might come within the principle of *Saunders v. Vautier*: but it is a gift to *George Chance* and *Howard* to pay the dividends to *Stevens Chance* for life only, and then the trust is at an end; and then there is a distinct gift of the interest to *Charles Chance* and *George Chance*, and after the death of the survivor the principal sum is to be divided, and one moiety to be paid to the children of each of them at twenty-five years of age. There is no gift therefore to the children, except in the direction to pay at twenty-five.

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v.  
CHANCE.

The gift to the children of *Charles* stands exactly in the same position as that to *George's* children, though there is no gift over of the latter moiety. The same rule must therefore apply here, as in other cases, that where there is no gift, except in the direction to pay, and the period of payment violates the rule as to remoteness, it is void.

Declare the Plaintiff entitled to the fund, and direct payment to him accordingly.

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## RATCLIFFE v. WINCH.

March 12.

After a decree or order on summons for the administration of an estate, a legatee will be restrained from proceeding in the County Court to recover a legacy, and that notwithstanding the legatee submits to take a judgment against the executor *de bonis propriis*, alleging a *devastavit*.

IN this case, an order was made, on summons at chambers (under the 15 & 16 *Vict.* c. 86), for the administration of the estate of a deceased testator. An application was now made for an injunction to restrain a legatee, who had been served with notice of the order, from prosecuting a plaint against the executrix in the County Court (under the 9 & 10 *Vict.* c. 95, s. 65, and 13 & 14 *Vict.* c. 61, s. 1), to recover a legacy of 50*l.*, and from taking any other proceeding, except under the administration order so obtained.

Mr. *Roupell*, in support of the motion.

Mr. *Tripp*, *contra*. This Court ought not to restrain a legatee of a sum not exceeding 50*l.*, from seeking a remedy expressly provided for him in the County Court; for otherwise the beneficial effect of the act will be destroyed, and the act itself rendered nugatory. No affidavit had been made to show the state of the assets, though there are some, besides which, a debt due to the estate has been lost by the *laches* of the executrix, who has thereby committed a *devastavit*. The legatee is therefore entitled to judgment *de bonis propriis* against the executrix, and he is willing to take that, instead of the usual judgment *de bonis testatoris*.

*The MASTER of the ROLLS.*

This is the ordinary case. The question is, whether there were assets at the death of the testator to pay the

the legatees. To ascertain that, an account must be taken, and the executrix will be made answerable for them, and for any *devastavit* she may have committed; but this Court will not allow one creditor or legatee to sweep away the whole assets, and leave nothing for the rest. This legatee, who is prosecuting his plaint, must come in, under the administration order, with all the other claimants, and he will then obtain his due share of the assets. The injunction must issue, but the legatee must have his costs of the proceeding in the County Court, down to the time of his being served with notice of the administration order. No affidavit as to the assets is necessary.

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v.  
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NOTE.—See *Terrewest v. Featherby*, 2 Mer. 480; *Clarke v. The Earl of Ormond*, Jacob, 122; *Lord v. Wormleighton*, Jacob, 148; *Lee v. Parke*, 1 Keen, 714; *Anon.* 2 Sim. & Stu. 424; *Farlow v. Wilson*, 11 Price, 95; *Curre v. Bowyer*, 3 Mad. 456; *Vernon v. Whellusson*, 1 Phillips, 466.

CRESWICK v. GASKELL.

March 14.

THE testator gave the residue of his real and personal estate to trustees, upon trust, during his sister's (*Martha Antrobus*) life, out of the annual proceeds to pay her an annuity of 200*l.* a year, and to pay one-third of the residue of the proceeds to *John Shaw Astley*, and the other two thirds as in his will mentioned. And after his sister's death, to sell, and as to one-third of the produce, the testator gave the same to *John Shaw Astley*, his executors, administrators and assigns.

And  
Real and personal estate were given upon trust, during the life of A., out of the income, to pay A. 200*l.* a year, and one-third of the residue to B.; and on the death of A., to sell and pay one-third to B.; then a gift over, on B. died in the

the death of B., before his share should "become due and payable." B. died in the life of A. Held, that the gift over took effect.

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 v.
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And he thereby declared, "that if any of his legatees should happen to die before his, her or their respective shares should become *due and payable*," and without leaving any child living at his decease, then he gave his share over to the survivor of his legatees. And he also provided, that if any of his said legatees should happen to die and leave children living at his decease, then he gave to such children the share of their respective parents.

John Shaw Astley died without issue, in 1832. *Martha Antrobus* survived him, and died in 1849. The Plaintiff, the representative of *John Shaw Astley*, now claimed, in his right, one-third of the produce of the residue.

Mr. *Roupell* and Mr. *C. C. Barber*, for the Plaintiff. *John Shaw Astley* took a vested interest in one-third of the residue, which was given not only to him, but to his executors, administrators and assigns. It was a vested gift, and was not divested by his death in the lifetime of *Martha Antrobus*, for he did not die before his legacy was "due and payable." These words imported two events, and unless they both happened, the gift over did not take effect. The legacy became due upon the testator's death, though not payable until the death of *Martha Antrobus*. It was "*debitum in præsenti, sed solvendum in futuro*." The Court has put a construction on the word "payable," limiting it to the period of vesting, 2 *Jarman on Wills* (a); and this, being a clause of forfeiture, is to be construed strictly, so as not to allow a vested gift to be divested by words of doubtful import.

Mr. —

(a) Page 697.

Mr. R. Palmer, Mr. Renshaw, Mr. Lloyd, Mr. Little, Mr. W. H. Clarke and Mr. Piggott, *contrà*, were not heard.

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GASKELL.

The MASTER of the ROLLS.

There is no reasonable doubt upon the construction of this clause of the will. The gift was undoubtedly vested, but there was a gift over, on the legatee dying before his share "should become *due and payable*." I am of opinion that the legatee did die before his share became "*due and payable*." It is impossible for the Court to say, that "due" means "vested," and change the expression into a gift over, if the legatee died before the legacy became "vested," in which case it would have no meaning. It is unnecessary to refer to the authorities on the subject (*a*), of which there are many. The bill must be dismissed.

(*a*) See *Bright v. Rowe*, 3 *Myl. & K.* 316.

HUFFAM *v.* HUBBARD.

IN this case, the testator bequeathed to two persons, in trust for his wife for life, the interest of 2,900*l.* consols; at her decease, in trust for his daughter *Mary*, wife of *William Huffam*, for life; "at her decease, to her surviving children lawfully begotten, when they have attained their twenty-one years, share and share alike;" and he left to the judgment of the trustees (whom he requests to act as guardians, in case of the death of his son-in-law), to expend what interest they might see necessary in the clothing, education, &c. of the children during their nonage.

March 15.

Bequest to *A.* for life, and, "at her decease, to her surviving children," when they have attained twenty-one. Held, that the survivorship had reference to the death of *A.*, and that those children only who survived her were entitled.

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 HUFFAM
 v.
 HUBBARD.

The testator died in 1802, and *Mary Huffam* died in 1852. She had four children, three only of whom survived her; and the question now raised was, whether the representatives of the deceased child took any share of the fund.

Mr. Roupell and *Mr. Simpson*, for the Petitioners.

Mr. R. Palmer and *Mr. Cotton*, in the same interest.

The MASTER of the ROLLS called on the other side.

Mr. Lloyd, contra, argued, that this case differed from *Cripps v. Wolcott* (a), in consequence of the addition, "when they have attained twenty-one years." That the vesting took place at that age, and that the survivorship had therefore reference to that period, and not to the death of the tenant for life, as in *Crozier v. Fisher* (b). He referred also to *Bouverie v. Bouverie* (c).

The MASTER of the ROLLS.

I am of opinion, that this case is not distinguishable from *Cripps v. Wolcott*. The case of *Crozier v. Fisher* is a very peculiar one; there was a gift to the trustees, on this special trust, to receive the rents and pay unto the children a just proportion, as they arrived at twenty-one, and invest the infant's share "till the youngest child should arrive at twenty-one, and then all the said children or the survivors of them to be let unto full possession of all his estates." Therefore there was an express direction, that the period of distribution should be when the youngest attained twenty-one.

The

(a) 4 *Mad.* 11.

(b) 4 *Russ.* 398.

(c) 2 *Phill.* 349.

The claim here is very different, and I can not distinguish this case from *Cripps v. Wolcott*. The rule laid down in that case is this:—The survivorship shall have reference to the period of distribution (a). I think that this rule is applicable here, and that those children only who survived the mother are entitled to the fund.

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 v.
 HUBBARD.

(a) See *Spurrell v. Spurrell*, V. C. Wood, April 23, 1853.

M'DONALD v. BRYCE.

ROBERT SHAWE, by his will (a), dated in 1802, bequeathed his residue (consisting of personalty) "unto *Robert Shawe*, the eldest son of the aforementioned *Peter Shawe*, for his sole use and benefit, upon the said *Robert Shawe* coming of age; failing him, to the next male child, procreate, of the body of the aforesaid *Peter Shawe*, and lawfully begotten, who shall attain the age of twenty-one years; failing the male children of the said *Peter Shawe*, lawfully begotten, to the aforementioned legatees and the survivors and survivor of them, in equal proportions; viz. Misses *Anne*, *Margaret*, and *Elizabeth M'Pherson*, and Mrs. *Christy Grant*, Mrs. *Isabella M'Donald*, Mrs. *Mary M'Donald*, and Mrs. *Amy M'Lean*, all daughters of the before-mentioned *Lewis M'Pherson*;" their respective shares to be at their free will and disposal.

March 15.
 The case of *Cripps v. Wolcott* (4 *Mud.* 11) is a decision binding on this Court.
 Bequest of residue to *Robert*, the eldest son of *Peter*, upon his coming of age; failing him, to the next male child of *Peter* who shall attain twenty-one; and, failing the male children of *Peter*, to seven legatees (named), and the survivors and survivor of them. *Robert* died an infant, and *Peter* survived all the

Peter

(a) See 2 *Keen*, 276.

residuary legatees, and had no other child. Held, that the survivorship had reference to the death of *Peter*, that the gift failed, and that the residue belonged to the testator's next of kin.

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Peter Shawe had one child only, viz. *Robert*, who died in 1814 at the age of eight years.

Peter Shawe himself died on the 8th of *September*, 1852, without having had any other issue. At that time, all the seven residuary legatees were dead; and the present question was, whether their representatives, or the next of kin of the testator, were entitled to the fund.

Mr. *Glasse* and Mr. *Selwyn*, for the representatives of the residuary legatees. The survivorship had reference to the death of the testator, or of *Robert Shawe*, and not to the death of *Peter Shawe*, who had no life interest in the property. On the death of *Robert*, the interest of the residuary legatees became vested, subject to be divested upon *Peter Shawe* having a son. The residuary legatees, who all survived *Robert*, are therefore entitled. *Cripps v. Wolcott* will be relied on by the other side. But that case was decided without reference to authorities to the contrary; one of which was a decision of the House of Lords, *Wilson v. Bayly* (a), which was not cited. It has not been since approved of, 2 *Jarman* (b). It was not followed in *Doe d. Long v. Prigg* (c); *The Commissioners of Charitable Donations, &c. v. Cotter* (d); and *Rogers v. Towsey* (e). In *Wordsworth v. Wood* (f), Lord *Cottenham* guarded himself against saying, whether *Cripps v. Wolcott* was or was not consistent with the former decisions. Sir *James Wigram* took the same course, in the case of *Shailer*

(a) 3 B. P. C. 195.

(b) Page 649.

(c) 8 Barn. & Cr. 231.

(d) 1 Dru. & War. 498.

(e) 9 Jur. 575.

(f) 4 Myl. & Cr. 645 & 1 H. L. Cas. 156.

Shailer v. Groves (a). They also cited *Pearson v. Casamajor* (b).

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Mr. *R. Palmer* and Mr. *Prout*, for the next of kin. The survivorship has reference to the period of distribution. The decision in *Cripps v. Wolcott* has never been overruled, and has since been followed; *Taylor v. Beverley* (c). It is "so reasonable and convenient for general application," that subsequent Judges have been favourably disposed to its adoption; 2 *Jarman* (d); 2 *Roper on Legacies* (e). *Doe v. Prigg*, and *The Commissioners, &c. v. Cotter*, related to real estate. Here everything was in contingency, until it was known, by the death of *Peter*, that he could have no son, and then the gift became vested in the survivors.

Mr. *James Anderson* and Mr. *Messiter*, in the same interest, cited *Hoghton v. Whitgreave* (f); *Williams v. Tartt* (g).

Mr. *Glasse*, in reply. *Hoghton v. Whitgreave* and *Williams v. Tartt* turned on the gift consisting in the direction to "pay and divide," and to "pay and apply." The contingency of *Peter* having a son who might become entitled did not make the vested gift in the residuary legatees contingent. Upon the authority of *Cripps v. Wolcott* itself, the death of *Robert* was the period of vesting and survivorship.

The MASTER of the ROLLS.

I am of opinion that the case of *Cripps v. Wolcott* (h)
is

(a) 6 *Hare*, 164.

(b) 1 *M'L. & Rob.* 685, 714.

(c) 1 *Coll.* 108.

(d) Page 649.

(e) Page 1387, 4th ed.; and
see 2 *Myl. & K.* 25.

(f) 1 *Jac. & W.* 146.

(g) 2 *Coll.* 85.

(h) 4 *Mad.* 11.

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is binding on me. It has since been followed, and I must adhere to it, until it has been reversed by the House of Lords, if ever that should take place, which I consider very improbable. The only question is whether the present case can be distinguished from *Cripps v. Wolcott*, by the circumstance that there is here no previous life interest in *Peter Shawe*. I think that does not distinguish this case; and I am satisfied, that there is no real distinction between the cases.

I concur in the argument on behalf of the respondents, that the interest of the residuary legatees was a contingent, until it was ascertained that *Peter Shawe* died without a son (a). One of the reasons, therefore, for distinguishing this case, namely, the anxiety of the Court to construe a gift vested, by ascertaining, on the death of the testator, who were the persons to take it, fails, for even if they were ascertained the gift must necessarily remain contingent up to that period. No advantage could therefore be gained in effecting the object, which the Court has striven to obtain, by construing it a vested interest.

I am of opinion that the next of kin are entitled to the fund.

(a) See 2 *Keen*, 282, where Lord *Langdale* took the same view.

1853.

Re FINCH.

March 15.

THE executrix of a mortgagor was desirous of paying off the mortgage for 700*l.*, and of having a transfer made to a trustee for her. The transfer being prepared and approved of, the mortgagee's solicitors, Messrs. *Finch*, on the 20th of *December*, 1850, forwarded their bill, amounting to 18*l.* 14*s.* 2*d.*, and an appointment was made for completion on the 22nd of *December*.

On the day appointed for "paying off" a mortgage, the solicitor of the mortgagee refused to part with the title-deeds, until payment of his bill of 18*l.*, which had been delivered two days previously. It was paid under protest. The Court refused a taxation, no pressing necessity for the title deeds appearing, and no items of overcharge being distinctly shown.

At the meeting, the deed being executed, and the principal and interest paid, 10*l.* was tendered for the costs. The mortgagee's solicitor refused to deliver up the title deeds until payment of the remainder of his bill, for which he claimed a lien. In the afternoon, the balance was paid, under protest, and the deeds were then handed over.

A petition was presented by the executrix, in *February*, 1853, for the taxation of the bill, but there was no evidence of any pressing necessity for obtaining the deeds on the 22nd of *December*, and no proof of over-charge. There was, however, a general charge of 5*l.* 5*s.* for many attendances.

Mr. *Cory*, in support of the petition. The payment of the bill was obtained by pressure, and made under protest, and there is a general item of 5*l.* 5*s.* "for many attendances" and "very numerous letters" to the Petitioner from 1842 to 1851, which will be disallowed. A taxation ought, therefore, to be directed.

Mr. *R. Palmer* and Mr. *Batten*, *contra*, were not heard.

The

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Re
FINCH.

The MASTER of the ROLLS.

You ask me to reverse *Re Browne* (a), which was affirmed by the Lords Justices. The Court will not open the settlement of a bill of costs, unless there be both pressure and objectionable items, or the overcharges are so gross as to amount to fraud. This bill was paid only under this pressure:—The solicitor says, “I have a lien for my costs, and will not deliver up the deeds unless you pay the bill.”

The petition must be refused with costs (b).

(a) 15 *Beav.* 61; 1 *De G. M. & G.* 322.

(b) Affirmed by the Lords Justices, May 9, 1853.

FOLIGNO *v.* MARTIN.

March 18.

After decree against a purchaser for specific performance, the Defendant made default in payment of the purchase-money. Held, that the vendor was entitled to rescind the contract.

BY the decree, dated the 2nd of *December*, 1852, it was ordered, that the agreement entered into between the Plaintiff, and the Defendant *Ritchie*, should be specifically performed and carried into execution. And it was ordered, that the Defendant *Ritchie* should, on or before the 29th of *January*, 1853, pay the Plaintiff 1,650*l.* and interest, and that the Plaintiff, at the expense of the Defendant, should execute an assignment of the property comprised in the agreement.

The

DATES.

1852. *Dec.* 2. Decree.

1853. *Jan* 29. Money to be paid.

1853. *March* 18. Order made.

The Defendant neither paid the purchase money nor obeyed the decree in any other respect.

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It was now moved, that the contract should be rescinded and the Plaintiff's bill dismissed without costs, or otherwise, that it might be ordered that all further proceedings should be finally stayed.

Mr. *Cole*, in support of the motion, argued, that the Defendant was bound to obey the decree, and that, if he did not, the Plaintiff was not to be held to a contract, which the Defendant refused to perform, or be compelled to take proceedings, which would ultimately be unavailing, to obtain the consideration money.

Mr. *Hardy*, *contra*, argued, that the Plaintiff must proceed to enforce obedience to the decree, and could not, by motion, entirely vary it. That the Plaintiffs, for some purpose of their own, were desirous of getting rid of the contract, which could not now be done. He asked no extension of time to enable the Defendant to make the payment.

*The MASTER of the ROLLS.*

My opinion is, that the Plaintiff is entitled to get rid of the contract, unless the Defendant pays the purchase money before the first day of next term.

If not then paid, the order must be made.

Mr. *Hardy* then consented to an immediate dismissal (a).

(a) See *Gray v. Gray*, 1 *Beav.* 419; *Cr.* 514; *Tanner v. Radford*, 199; *Harding v. Harding*, 4 *Myl.* 519, note.

1853.

Jan. 11.

Feb. 19.

March 8, 18.

An order obtained *ex parte* by a married woman, for leave to file a bill and sue *in formá pauperis*, without a next friend, held irregular, and discharged.

PAGE v. PAGE.—*In re* PAGE.

ON the 11th of *January*, 1853, an *ex parte* order was made upon the authority of *Wellesley v. Wellesley (a)*, giving leave to *Sarah Elizabeth Page*, a married woman living separate from her husband, to file a bill and sue *in formá pauperis* without a next friend. The application for the order was supported by an affidavit of the married woman as to her want of means, and her inability to procure a next friend. The affidavit was sworn on the 28th of *December*, 1852, but was not filed or headed in any matter or cause. The Registrar declined to draw up the order, until the affidavit on which it was based had been filed; and at the Affidavit Office, they refused to file the affidavit, unless headed in some matter or cause.

A copy of the affidavit headed, "In the matter, &c.," was then made, and was, in this form, re-sworn by the married woman, and filed on the 25th of *January*, 1853. The order was thereupon drawn up. Two of the Defendants, who had not entered an appearance, applied on the 19th of *February*, for leave to enter a conditional appearance, with a view to enable them to move to discharge the order, without waiving its irregularity, but the other two Defendants had entered an appearance and interrogatories had been filed and delivered to them.

The MASTER of the ROLLS refused the application.

Of 

(a) 16 Sim. 1.

On the 25th of *February*, notice of motion was given by two Defendants to discharge the order for irregularity, and to take the bill off the file. On the 8th of *March*, the motion came on to be heard.

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Mr. *R. Palmer* and Mr. *W. H. Clark*, in support of the motion, contended, that the order was irregular, first because it was not made in any existing suit or matter then pending; and, secondly, because it was based upon an affidavit which had not been filed. They argued, that the case of *Wellesley v. Wellesley (a)*, which had been cited in the absence of the Defendants, in support of the application, was no authority whatever for such an order, for in that case, a suit was actually in progress, and the application had been made in it. That if it should be objected, that the parties now moving had not as yet appeared, the answer was, that it was impossible for them to appear, without waiving the irregularity now complained of.

Mr. *Terrell, contrà*. The order was necessarily obtained before any suit was pending, for it was the very object of it to obtain leave to institute the suit in this particular form, and, except by such leave, no bill or proceedings would be allowed to be commenced by a married woman without a next friend. It was equally impossible to have the affidavit filed in a cause or matter not yet pending. In *Wellesley v. Wellesley*, there was an existing suit, and the married woman there asked for an order to continue the proceedings *in formâ pauperis*; but when no suit is pending, the proper course is, to apply for leave to file a bill, and having filed it, to obtain the order to sue *in formâ pauperis*. The case
of

(a) 16 Sim. 1.

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of *Coulsting v. Coulsting* (a), referring to *Dowden v. Hook* (b), is an authority for a married woman obtaining an order to sue *in formâ pauperis*; but the recent case of *Ex parte Hakewill*, before the Lord Justices (c), set the question at rest. In that case, Vice-Chancellor *Kidderley*, having doubts as to whether such an order could be made, the Lords Justices, when applied to, granted leave to a married woman to file a bill and sue *in formâ pauperis*.

The MASTER of the ROLLS.

I do not see how such an order could be made, except in some pending suit or matter. If such an application could be properly made at all, I think it ought, in the first instance, to be, for leave to file a bill without a next friend, and afterwards, for an order to sue *in formâ pauperis*. *Wellesley v. Wellesley* is no authority for such an order as this, and does not apply to the present case. The matter must stand over, in order that the case of *Ex parte Hakewill* may be looked into, and the practice ascertained.

March 18. *The MASTER of the ROLLS.*

Before disposing of this case, I was desirous of ascertaining the opinion of the other branches of the Court, and the course of practice adopted there.

The case was this:—Mr. *Terrell* applied for an order for leave for a married woman to file a bill and sue *in formâ pauperis*.

(a) 8 Beav. 463. (b) 8 Beav. 399. (c) 3 De G. M. & G. 116. —

formâ pauperis, without a next friend, and on the authority of *Wellesley v. Wellesley*, I inadvertently gave the leave asked. Mr. *W. H. Clarke* then moved to discharge the order for irregularity, and the point was argued.

I am of opinion, that the order is irregular and cannot stand. The case of *Wellesley v. Wellesley*, which is very briefly reported, is no authority for the present order; for in that case, Lady *Mornington* having filed a bill in the ordinary and usual course, filed a supplemental bill, for the purpose of prosecuting her suit. No one would act as her next friend, and she applied to the Court to prosecute it *in formâ pauperis*, and the order was granted.

On the authority of *Wellesley v. Wellesley* and the order made by me in this case, Mr. *C. M. Roupell* applied to the Lords Justices in *Ex parte Hakewill*, for leave for a married woman to present a petition to obtain access to her children, without a next friend, and they granted the order. That, however, was an application under Mr. Justice *Talfourd's* Act, to obtain access to her children, and the Lords Justices, after considerable doubt, appear to have directed that to be done, but Vice-Chancellor *Kindersley* doubted whether he had any such authority. That was a different case from the present. The ordinary course of proceedings in cases like the present is this:—The bill is filed by the married woman by her next friend, in the ordinary course, and she then makes her application to the Court (supported by the usual affidavit) for leave to sue *in formâ pauperis*, without a next friend, but such an application cannot be made *ex parte*, but only upon notice served in the regular way. The object of this is, to give the other parties to the suit an opportunity of being heard on the matter.

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Besides, in this case, there is no pending matter in which an affidavit can be made as a foundation for the application, and such an affidavit can only be made in some pending cause or matter.

Upon every view of the case, therefore, the order is irregular, and must be discharged, but without costs, as the Court ought originally to have refused it.

NOTE.—See *In re Lancaster*, L. C. and L. J. (18 March, 1854.)

CROSS v. THOMAS.

March 18.

Parties against whom a supplemental order had been made, under the 15 & 16 Vict. c. 86, s. 52, not having entered their appearance, liberty was given to the Plaintiff to enter an appearance for them.

IN this case, the principal Defendant became bankrupt, whereupon (under the 15 & 16 Vict. c. 86, s. 52) it was, on the 12th February, 1853, “ordered, that the suit be carried on and prosecuted against the assignees,” as if they had been parties to the original suit.

This order was served on the assignees, but they did not enter their appearance, as they were bound to do, under the above section.

Mr. *Beavan* now moved that the Plaintiff might be at liberty to enter an appearance for the assignees. He referred to the 29th order of May, 1845 (a), which, he observed, did not apply to the present case, no *subpœna* having been served, and this rendered a special application necessary.

The MASTER of the ROLLS made the order, and the appearance was, on the 9th of April, 1853, entered accordingly.

(a) Ord. Can. 294.

1853.

Re FIELD.

March 19.

AN order, dated the 26th of *November*, 1852, was made for the taxation of a solicitor's bill, and the Master was to make his report in a fortnight ("unless the said Master should certify, that further time was necessary to enable him to make his report) or this order was to be of no effect."

An order for taxation was to be void, unless the Master made his report in a fortnight, or certified that further time was necessary. The time elapsed without such certificate, and the parties afterwards attended several times before the Master without objecting. Held, that the irregularity had been waived, and an order was made for the Master to proceed in the taxation.

The time expired without any certificate having been made, but the solicitor afterwards attended before the Master several times, and proceeded in the taxation, without objecting. He at last objected, and the Master then considered his authority gone.

Mr. *Wickens* now moved, on behalf of the client, that the Master might be at liberty to certify that further time was necessary.

Mr. *Foster, contra*. The order is altogether void, the condition not having been complied with, and it cannot now be revived.

The MASTER of the ROLLS.

I am of opinion that the omission by the Master to certify that further time was necessary has been waived by both parties, and that the proper order is to this effect:—Let the Master be at liberty to certify if further time be necessary, and in case he shall so certify, let him proceed in the taxation, in the same manner as if he had enlarged the time within fourteen days.

1853.

Feb. 21.

HEWISON v. NEGUS.

March 19.

A wife may, in many respects, enter into a contract for valuable consideration with her husband; so, conversely, a husband may become a purchaser from his wife of property belonging to her.

A post-nuptial settlement of a wife's estate, whereby it is limited to the wife for her separate use for life, without power of anticipation, with remainder to the husband for life, with remainder to the children, &c., is not void as against a subsequent purchaser from the husband and wife, as a voluntary settlement under the 27 Eliz. The modification, by the husband, of his life estate in possession, and by the wife, of her inheritance, form a good and valuable consideration.

THIS was a suit for foreclosure. It appeared that in 1848, the freehold and copyhold estate in question stood limited to *S. B.* for life, with remainder, to a moiety, to *Eleanor*, the wife of *William Negus*, in fee.

By a post-nuptial settlement, dated the 9th of November, 1848, and duly acknowledged, Mr. and Mrs. *Negus* conveyed their moiety of the estate (subject to the prior life estate) to trustees and their heirs, upon trust to pay the rents to Mrs. *Negus* for life, for her separate use, and without power of anticipation, with remainder to Mr. *Negus* for life; and after the decease of both Mr. and Mrs. *Negus*, to the use of such person or persons as Mrs. *Negus* should by will appoint; and in default of appointment, to the use of her child or children, as tenants in common in fee, with cross-remainders between them, with an ultimate limitation to Mr. *Negus* and her heirs.

On the 10th August, 1849, the tenant for life died.

By indenture, dated 2nd April, 1851, and duly acknowledged, Mr. *Negus* and his wife conveyed their moiety of the estate, by way of mortgage, to secure 200*l.*, to the Plaintiff *Hewison*, who, at the time, had notice of the settlement of 1848. The money not being paid,

id, *Hewison* filed his bill against *Negus*, his wife, the trustees, and the children of the marriage, to foreclose.

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Mr. *Lloyd* and Mr. *Bilton*, for the Plaintiff. As against the Plaintiff, who is a purchaser for valuable consideration, the settlement executed, in 1848, by Mr. and Mrs. *Negus*, in favour of themselves and their children, is purely voluntary, and on the authority of all the cases is void within the meaning of the 27 *Eliz.* c. 4. The settlement being post-nuptial, the children have not the benefit of the marriage consideration, and are merely volunteers, *Marrie v. Nind* (a); and this Court will not assist them in perfecting the settlement; *Pulvertoft v. Pulvertoft* (b); *Worby v. Gutteridge* (c). The deed is equally void, though the Plaintiff had notice of it; *Buckle v. Mitchell* (d); *Kelson v. Kelson* (e); *Doe d. Otley v. Manning* (f); *Doe d. Baverstock v. Rolfe* (g). The case of *Utterfield v. Heath* (h), which was lately decided in this Court, is an authority directly in point. There a husband and wife executed a post-nuptial settlement of the wife's estate, in favour of themselves successively, the remainder to their children, and the husband and wife afterwards conveyed the estate to trustees for sale. It was held, that the settlement was void, and a purchaser from the trustees was compelled to take the title. The property, no doubt, belonged to the wife at the time of the settlement, but it is difficult to see, how that circumstance could affect the question or prevent the settlement from being considered voluntary; for there could be no contract between the husband and wife on which either of them could sue, and therefore there could be no consideration for the settlement. The point, indeed, is settled by authority, for it is expressly laid down, in

Goodright

(a) 1 *Myl. & Cr.* 17.

(b) 18 *Ves.* 84.

(c) 18 *L. J. (Ch.) N. S.* 9.

(d) 18 *Ves.* 100.

(e) 17 *Jur.* 129.

(f) 9 *East*, 59.

(g) 8 *Ad. & El.* 650.

(h) 15 *Beav.* 408.

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Goodright d. Humphreys v. Moses (a), that the fact of the property being that of a married woman, and the settlement being made during coverture, does not prevent the stat. 27 *Eliz.* c. 4, from operating upon it. Though the limitations in a marriage settlement to the brothers of a settlor and their issue have been held void, as against subsequent purchasers, although a valuable consideration existed as between the husband and wife, for the marriage consideration does not extend to collaterals (b).

Mr. C. Chapman Barber, for subsequent mortgagees.

Mr. R. Palmer and Mr. Fane, for the trustees of the settlement, and the two children of Mr. and Mrs. Negus. In this case, the settlement was made with the mutual consent of the husband and wife, and could not have been made without the concurrence of both. The consideration given on the part of the husband was the postponement of his immediate life estate, to a life estate to his wife, limited to her separate use, and without power of anticipation. This was a valuable consideration, sufficient to support the settlement. If the husband, instead of conveying his life interest in his wife's property, had conveyed an estate of his own to trustees, for the benefit of his wife and children, and the wife, on her side, had conveyed her own estate, absolutely, to her husband, there would then, without doubt, be a sufficient valuable consideration, on both sides, to support the conveyance. What difference then does it make, that they each convey the independent interest which they respectively have in the same estate? The unity of persons, as between husband and wife, does not prevent a valuable consideration passing from one to the other, *Scot v. Bell* (c); 2 *Sugden, Vendors* (d); and 2 Sir James

(a) 2 Sir W. Black. 1019.

(b) See *Johnson v. Legard*, 6 *Maule & S.* 60; *Turn. & R.* 281;

Gray v. Legard, 9 L. J. (O. Ch. 80.

(c) 2 *Lev.* 70.

(d) Page 167, 9th ed.

S.)

James Wigram gave it to be understood, that such was his opinion, though he did not actually so decide, in *Parker v. Carter* (a). The question in these cases is, whether the husband and wife have respectively bought the assent of the other to the making the settlement. If they vary their interests in the estate, that is sufficient to support the settlement. The avoiding of voluntary settlements by subsequent conveyances for value has, latterly, been considered by the Court as having been carried too far, and the inclination is certainly not to extend the doctrine. The children are not volunteers, but purchasers, through their parents, as in the case of *Ford v. Stuart* (b), where a valuable consideration given by a stranger was held sufficient to support a settlement.

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They cited *Roe d. Hamerton v. Mitton* (c); *Kekewich v. Manning* (d); *Ellis v. Nimmo* (e); *Doe d. Newman v. Rusham* (f).

Mr. *Osborne*, for Mr. and Mrs. *Negus*.

Mr. *Lloyd*, in reply.

The MASTER of the ROLLS.

My present impression is, that *Butterfield v. Heath* does not apply to this case, but I will look into the cases and consider.

The MASTER of the ROLLS.

March 19.

I reserved my judgment in this case, for the purpose of

(a) 4 *Hare*, 409.

(b) 15 *Beav.* 493.

(c) 2 *Wils.* 356.

() 1 *De G. M. & G.* 176.

(e) *Ll. & G. temp. Sugden*, 333.

(f) 21 *L. J. (N. S.) Q. B.* 139.

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of considering, whether it came within the principle of *Butterfield v. Heath* (a), decided by me in *April* of last year. In that case I decided, that a voluntary settlement made by a married woman, of her real estate, was within the provisions of the statute of 27 *Eliz.*, and that it was void as against a subsequent purchaser of that estate, even though with notice of the previous settlement. I retain that opinion; and if the husband and wife have in this case executed a voluntary settlement, I am of opinion that it falls within the provisions of that statute, and must be held to be void as against the subsequent mortgagee.

On the 9th of *November*, 1848, the husband and wife (Mr. and Mrs. *Negus*) executed the settlement which is alleged to be voluntary; and the only question which arises in this cause is, whether there is a consideration sufficient to support it. If there be any consideration to support it, it must be found in the settlement itself; for it is not alleged that any consideration passed from any one, except what appears on the face of the deed, and what may there appear to have passed from one of the parties to the deed to the other. It is undoubtedly clear, both on principle and authority, that a wife may, in many respects, enter into a contract for valuable consideration with her husband. The release of dower by a wife has been considered to be a sufficient consideration to constitute her a purchaser of a settlement of the property of the husband, made on that consideration.

I am also of opinion, that the converse of the proposition is true, and that a husband may become a purchaser from his wife of property belonging to her. The settlement, in this case, is to this effect: It bears date
the

(a) 15 *Beav.* 408.

the 9th *April*, 1848, and was made by the husband of the first part, the wife of the second part, and two trustees of the third part. After reciting that the wife was entitled to a vested reversion in fee simple in one moiety of certain freehold and copyhold hereditaments, and that she and her husband had agreed to settle the same, the deed witnessed, that they granted, released and confirmed to the trustees, the freehold hereditaments (subject to the estate of the tenant for life), upon trust to pay the rents and profits of them to *Eleanor Ann Negus*, the wife, for her separate use and without anticipation, upon her sole receipt; and subject thereto to the husband for his life, and after the decease of the survivor, for such persons as *Eleanor Ann Negus* should by will appoint, and in default of appointment, to her children, as tenants in common in fee simple, with cross executory limitations, in case of any one of them dying under twenty-one and without issue. The deed then contained a covenant by the husband to surrender the copyhold to the trustees on the trusts of the settlement, and the usual clauses to be found in such settlements.

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I entertain no doubt, upon the full consideration of this settlement, that it was executed by the wife for valuable consideration, and that it does not fall within the principle of *Goodright v. Moses* (a), and *Currie v. Nind* (b), which were followed by me in *Butterfield v. Heath* (c). I concur with the argument which was urged, that the surrender by the husband of his right to receive the rents and profits of the hereditaments during coverture, and his giving his wife a sole and exclusive power and control over them, is a valuable consideration sufficient to support this settlement. In truth, no doubt could arise on the subject, if the consideration had sprung from another source. For instance, if the estate

for

(a) 2 *W. Black.* 1019. (b) 1 *M. & Cr.* 17. (c) 15 *Beav.* 408.



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for the separate use of the wife had been omitted, and if the husband had, as a consideration for the wife settling this property on the children, vested in the names of the trustees of the settlement a sum of stock, the dividends of which were equal in amount to the annual produce of his estate, and had directed the trustees to pay these dividends to the separate use of the wife, as a consideration for the settlement on the children, no question would have been raised; and yet it is manifest, that it would differ from the settlement actually made in form only, and that in substance it is the same thing.

I am of opinion, therefore, that this settlement is a valid and subsisting settlement, and that the mortgage of the 2nd *April*, 1851, is invalid as against that settlement, and that consequently the suit fails, and the bill must be dismissed, but without costs.

NOTE.—Affirmed by the Lords Justices, *May* 30, 1853.

March 14, 15,
24.

MACLEOD v. ANNESLEY.

A power to invest trust monies on real security in *Ireland* authorizes a loan on leaseholds for lives, perpetually renewable at a head rent.

The general understanding

is, that a trustee should only lend to the extent of two-thirds of the value on agricultural freeholds, and to the extent of one-half on freehold houses. *Semble*, also, that one-half is the limit in the case of a leasehold renewable for ever at a large head rent.


Trustee made liable for a loss on a mortgage investment, he not having taken due precautions to ascertain the value of the property mortgaged.

Incumbrancer *pendente lite* held not an indispensable party to a suit to recover the fund.

BY the settlement made on the marriage of *Norman Macleod* with Lady *Hester A. Annesley*, in 1801, a sum of 10,000*l.*, *Irish* currency, was assigned to trustees, upon trust for Lady *Hester* for life, with remainder to *Norman Macleod* for life, with remainder to their children, as she should appoint, &c.

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The deed provided, that it should be lawful for the trustees to lend the trust monies to Viscount *Valentia*, “at interest, on the security of any freehold, leasehold or copyhold messuages, lands or other hereditaments, of competent value, in any part of *England* or *Ireland*, and also that it should and might be lawful for the trustees,” in case the sum of 10,000*l.*, or any part thereof, should not be advanced to Viscount *Valentia*, to lay out and invest the 10,000*l.* in their or his name or names, in the public funds of the United Kingdom of *Great Britain* and *Ireland*, or upon government or real security in *England*, *Ireland*, *Scotland* or *Wales*,” but with the approbation and consent in writing of Lady *Hester* and *Norman Macleod*, if living.

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On the 15th of *May*, 1843, the Defendant *Arthur Annesley* (being then the sole trustee), advanced the sum of 7,320*l.*, part of the trust monies, upon mortgage of estates in *Ireland*, which were held for lives at a rent of 42*l.* 12*s.* 11*d.*, with a covenant for perpetual renewal, on payment of a pepper corn. Interest was reserved at 6 per cent., to be reduced to 5½ if paid within a month.

The gross rental of the estate was about 923*l.*, but it was subject to the head rent, a rent charge, quit rent and poor rates, which left a surplus of about 430*l.* only.

Norman Macleod died in 1836, and Lady *Hester* in 1844. They had four children, viz. the Plaintiff *Lucy*, and the Defendants *Arthur*, *John* and *Edward*. Under an appointment duly executed, the Plaintiff was entitled to 4,334*l.*, part of the trust fund, and her brothers, *Arthur*, *John* and *Edward*, to the residue. Scarcely any interest had ever been paid on the mortgage, and the

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the security had become wholly deficient, the answer even admitting, that the fixed charges equalled the present rental. In 1851, *Lucy Macleod* filed her bill against the trustee and her brothers, challenging the propriety of the investment, and seeking to make the trustee liable for a breach of trust, and to fix him with the amount of the trust monies so invested.

It appeared, that pending the suit, the Plaintiff had incumbered her share, and the trustee, on that account, objected to the suit for want of parties.

Mr. *Lloyd* and Mr. *Karslake*, for the Plaintiff. First, a trustee is not justified in investing in leaseholds, unless he has an express power to do so; *Fyler v. Fyler* (a); *Fuller v. Knight* (b); *Wyatt v. Sharratt* (c). Here, the power to lend on leaseholds was confined to a loan to Lord *Valentia*, but on a loan to any other person the security must be on "real security," and a power to lend on real security does not authorize a loan on the security of mere leaseholds. The existence of such a security depends on the due payment of the rent; for if unpaid, the landlord may not only destrain, but bring an ejectment and determine the estate altogether.

Secondly, there is no sufficient proof of any consent in writing having been given by Lady *Hester*, as required by the power.

Thirdly, the trustee has invested the trust money on a plainly inadequate security, and did not take proper precautions to ascertain its value, previous to advancing the money. The rule is, that on a fee-simple security,

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(a) 3 *Beav.* 550.

(b) 6 *Beav.* 205.

(c) 3 *Beav.* 498.

a trustee is not justified in lending beyond two-thirds of the value of the property; *Stickney v. Sewell* (a). Here, the surplus rents, at the date of the loan, were, after deducting the necessary expenses of collection, insufficient to keep down the interest, and no proper valuation or examination of the security was made prior to the loan.

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Fourthly, there has been no acquiescence on the part of the Plaintiff; she had no interest at the time, and to bind her by acquiescence, it must be shown, that she had full notice, and was aware that a breach of trust was in contemplation; *Walker v. Symonds* (b); *Bennett v. Colley* (c).

As to the objection for want of parties, they cited *Bridget v. Hames* (d), and argued, that the Court had now the power, under the 40th order of *August*, 1841 (e), of making a decree saving the rights of the absent parties; and under the Equity Improvement Act (f), one *cestui que trust* could maintain a suit without making the other *cestuis que trust* parties.

Norris v. Wright (g); *Pocock v. Reddington* (h); *Lyse v. Kingdon* (i), were also cited.

Mr. *R. Palmer* and Mr. *Renshaw*, *contra*. First, the power authorizes an investment on "real security in *Ireland*," and therefore upon a freehold estate of unlimited duration, which is the ordinary freehold tenure in that

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| (a) 1 <i>Myl. & Cr.</i> 8. | (f) 15 & 16 <i>Vict.</i> c. 86, s. 42, |
| (b) 3 <i>Swanst.</i> 1. | r. 4. |
| (c) 5 <i>Sim.</i> 11; 2 <i>Myl. & K.</i> | (g) 14 <i>Beav.</i> 291. |
| 232. | (h) 5 <i>Ves.</i> 794. |
| (d) 1 <i>Coll.</i> 72. | (i) 1 <i>Coll.</i> 188. |
| (e) <i>Ord. Can.</i> 176. | |

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that country. Secondly, when the security was taken it was sufficient, the estates having four years previously been valued at 1,427*l.* a year. The failure of the potatoe crop in *Ireland*, and the consequent famine, disturbances and distress, have since depreciated the value of this and all other property in *Ireland*, and rendered the security insufficient; for this unforeseen misfortune, a trustee cannot, in justice, be held responsible. Thirdly, the Plaintiff is barred by her concurrence in the investment, and by the lapse of time, during which she has acquiesced in the transaction; *Browne v. Cross (a)*. Fourthly, the suit is defective for want of parties. The rights of the parties cannot be determined in the absence of their incumbrancers.

The MASTER of the ROLLS.

The points to be considered are the following: first, whether this was a proper security on which to advance trust money. Secondly, if the trustee took all reasonable steps which he ought to have taken for ascertaining that fact, or was deceived and could not reasonably have ascertained the state of the property. And thirdly, whether there is any acquiescence which binds the Plaintiff.

With respect to the nature of the security of the property itself, I entertain no doubt. I think that where a power is expressly given to a trustee, to invest trust money in land in *Ireland*, he would not be precluded from investing it in leaseholds, perpetually renewable with a head rent, for this is the common tenure of land in *Ireland*. Provided the security is sufficient, I do not think the peculiarity of the tenure is a sufficient reason for saying, that the trustee has committed

(a) 14 *Beav.* 105.

committed a breach of trust. The tenure, in fact, differs very little from a fee simple subject to a head rent; but the circumstance that it is subject to a considerable head rent makes it the more important for the trustee to have regard to the amount of the surplus rent and to the value of the property.

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I do not know that it has ever been distinctly laid down by authority, but it has been the general understanding of the profession, and the general practice of the Court, in these cases, to consider, that a trustee is not justified in advancing money on agricultural freeholds, to the extent of more than two-thirds of the value, or of more than one-half the value on freehold houses. Considering this as a freehold, subject to a large head rent, which must always be paid, whatever variation there may be in the value of the property, I should (but without intending to lay down any rule on the subject) hardly consider it safe, for a trustee to advance money, on the security of property of that description, to a greater extent than is allowed by the Court to be advanced on a freehold house; and if a trustee were to lend trust money to a greater extent, he would hardly be considered to have exercised a wise or safe discretion.

Now what does the value of this property turn out to be? It is proved, on the part of the Defendant, that the surplus rents, in 1843, when the money was advanced, averaged about 430*l.*; for the gross rental being 923*l.*, and the outgoings about 493*l.*, I think 430*l.* may be taken to have been the surplus in the year 1843. I do not say anything about the charges of the surveyor and the like, because they do not appear to me properly to enter into the valuation, in a question of this description.


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scription. On this property, on which the head rent was 421*l.*, and the whole outgoings 493*l.*, leaving a surplus of merely 430*l.*, which was to bear all the variations in value, 7,320*l.* was advanced at interest at 6*l.* per cent., to be reduced to 5½*l.*, if paid punctually. Now interest at 6*l.* per cent. amounts to 439*l.* 4*s.* So that if the interest were not paid punctually, the surplus rents would have been insufficient to pay the mere interest on the money advanced; and if the interest were paid regularly, the surplus would only have been 27*l.* 8*s.* It is obvious, that no trustee could be justified in lending money with knowledge that such was the state of the property. It is idle to say that a valuation was made four years before, on behalf of the Court of Exchequer, in which a gentleman considered that it ought to be let for 1,427*l.* a year. The test of value is, what a property actually lets for, and what, in truth, could really be obtained for it; for it is always to be inferred, that the landlord would obtain as much as he could for his property. A trustee, who ascertains that the rack rental barely produces sufficient to pay the interest of the money he advances, would clearly not be justified in this Court in advancing it. This is totally independent of the circumstance that there was a large head rent to be paid in the first instance. If the trustee, therefore, was aware of the state of the property, and there was no acquiescence on the part of the *cestui que trust*, it is impossible, consistently with the numerous decisions on the subject, to hold, that the trustee was justified in lending this money on property of that nature.

The next question is, whether any fraud was really practised on this gentleman, and whether he was deceived as to the value of the property? He does not seem to have taken any pains to ascertain its real value

Mr.

Mr. *James Josiah Hardy* had informed the family, who had informed the trustee, that the property was worth 1,400*l.* a year, but the trustee took no means to ascertain that fact himself. It was his duty, when exercising the office of a trustee, to ascertain the exact and accurate state and value of the property, before he advanced the trust money; and it is not sufficient for him to say, that he left it to other persons to do so. There is nothing to lead me to the conclusion, that if he had taken proper pains, he would not have ascertained the real value and situation of the property.

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I next come to consider, whether there has been any acquiescence which binds this Plaintiff. I apprehend that the Court does not require distinct evidence, in writing, signed by the Plaintiff, that she acquiesced, but there must be reasonable evidence that she understood what she was about, and that knowing she acquiesced in it. I entertain very little doubt that both Mr. *Edward Macleod* and Lady *Arabella Macleod* sanctioned and approved of this transaction, and pressed it on the trustees, but I think there is no evidence of acquiescence to bind or bar the Plaintiff.

An objection is then taken for want of parties, and it is said, that there ought to be additional parties, because all the children have incumbered their shares. Now the only share which, in my opinion, it is material to consider, is that of the Plaintiff, which has been incumbered pending the suit. The incumbrancer would clearly, therefore, be bound by the proceedings in this suit; but I apprehend that the 42nd section of the statute of 15 & 16 *Vict.* c. 86, applies to all suits, and one of the rules is, that any one of several *cestuis que trust* under any deed or instrument may, without serving any

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other of such *cestuis que trust*, have a decree for the execution of the trusts of the deed or instrument.

Now, without saying that that extends to the case of repairing a breach of trust, or entering into that question, I am of opinion, that in this case, dealing only, as in my opinion I can only deal, with the share of the Plaintiff and no other share, the objection is not such as ought to preclude the Court from making the decree which I propose to make; and I am therefore of opinion that the Defendant must be declared liable to make good to the Plaintiff the sum of 4,334*l.* which has been appointed to her, and interest, and it must be paid into Court for the protection of her incumbrancer.

Re LEWIN.

April 12.

Where a solicitor is retained by two persons jointly, an application for taxation by one, in the absence of the other, should not be made as of course.

A SOLICITOR was employed by two trustees, *Joseph Evans* and *Francis Evans*, jointly. *Francis Evans* went abroad; and *Joseph Evans*, on the 7th of *March* last, obtained an order of course, for the taxation of the bill, representing he had employed him, and omitting all mention of *Francis Evans*. He alone submitted to pay what should appear due.

Mr. *Morris* moved to discharge the order for irregularity. He argued, that this was not a proper case for an order of course, and that the facts had been erroneously stated, on the application for the order. He cited *In re Perkins (a)*, as being in point.

M. R.

(a) 8 Beav. 241.

Mr. Willcock, *contra*, argued, that the co-trustee being in *America*, the solicitor had acted for one alone. He cited *In re Stephen* (a).

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There was a joint employment of a solicitor, and the application for taxation is made by one only. The Court, in such cases, has always considered it proper that a special application should be made. Subject to what I might hear on the other side, I should consider it would be very much of course to direct a taxation on the application of one, where the other could not, by reason of his absence, concur. The Court might consider the case in the same light, as if there had been a refusal to concur.

Here the application is made by one, without the concurrence of the other, in which case the Court has considered a special petition necessary. This is shown by the cases of *In re Chilcote* (b); *Lockhart v. Hardy* (c); *In re Hair* (d).

In this state of circumstances, I must discharge the order, but without costs.

(a) 2 *Phil.* 562.
(b) 1 *Beav.* 421.

(c) 4 *Beav.* 224.
(d) 10 *Beav.* 187.

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Feb. 25, 28.

In re MANCHESTER NEW COLLEGE.

April 13.

The operation of the general words of the stat. 52 Geo. 3, c. 101 (Sir Samuel Romilly's Act), has been cut down, by the decisions of the Courts, to cases which arise between the trustees and *cestuis que trust* of a charity, and even in such cases, the Court must exercise a discretion as to whether the act can be applied with advantage to the charity.

Where the direction of the Court is required for the administration of a charitable trust, and there is no question between the trustees and

strangers, and the objects of the charity have no separate and conflicting interests, the Court has jurisdiction on petition under the act, and ought to exercise it, though there is no appeal from the *Master of the Rolls* in such a case except to the House of Lords.

An academy for the education of English Presbyterians was established at *Warrington*, and was governed by a body of trustees, who afterwards deemed it expedient to remove it to *Manchester*, thence to *York*, and back again to *Manchester*. There was no trust deed or document declaring the original objects of the charity, but it was stated, in a resolution of the trustees, to be for the benefit of that part of the kingdom which was totally deficient in academies. The trustees having presented a petition asking to have the academy removed to *London*: Held that the trustees had power so to remove it: that the object of the charity was to afford education to students for the ministry and others: and that its locality was a secondary consideration, and looked upon only as the means to an end.

THIS was a petition, presented in *February* last under the statute 52 Geo. 3, c. 101 (Sir Samuel Romilly's Act) by twenty out of 195 persons, who, at that time, were subscribers to, and entitled to be trustees of, the charity called the "*Manchester New College*," praying a declaration by the Court, that it would be for the benefit of the institution that it should be established in *London*, as a theological institution for the education of young men designed for the ministry among Protestant Dissenters, of the class or description called Presbyterians, and to be in connection with *University College, London*, for the literary and scientific education of such young men; and that, notwithstanding such removal from *Manchester* to *London*, the rent, interest and income of the property belonging to the charity might be applied, by the trustees, as the committee for the time being of the trustees of *Manchester New College* should, from time to time, direct, and if necessary, that there should be a scheme for the future management of the charity.

It appeared, from the statements in the petition, which were not disputed, that after the Act of Uniformity^(a), there arose a class of people called *Nonconformists*, and that one section of these, called the English Presbyterians, after the passing of the Act of Toleration^(b), and up to the present time, have maintained, in different parts of *England* and *Wales*, several colleges or academical institutions, in which university learning has been taught, and young men have been educated for professional or civil life, and especially for the Christian ministry, without subscription to religious articles, or confessions of faith. These academies, however, could never be permanently fixed to any particular places, owing to the necessity which was felt of connecting them with the ministry of some neighbouring congregation, of which the minister was of sufficient ability and learning to impart instruction.

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In 1754, on the ground of a total deficiency of such academies in the northern part of *England*, an institution of the kind was projected, and soon after established, at *Warrington*; and at a meeting of the trustees, in *June*, 1757, it was resolved, "that for the present, and as a temporary settlement, *Warrington* is the most convenient situation for the academy." In 1783 it was given up for want of funds to support it.

The institution was revived in 1786, and was then transferred to *Manchester*, in the manner stated in the judgment^(c), and afterwards, in 1803, to *York*, and, lastly, in 1839, back again to *Manchester*, from which place it was now desired to remove it to *London*. It having been ascertained, by a committee appointed at a special meeting of trustees, held on the 8th of *December*, 1852, that the trustees of *Manchester* New College could, by
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(a) 13 & 14 *Car.* 2, c. 4.
 (b) 1 *W. & M.* c. 18.

(c) See *post*, page 620.

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an arrangement with the council of University Hall, in the vicinity of University College, *London*, provide the means of a common, religious, and ethical culture for law and divinity; and that, in the opinion of Counsel, they could effect the removal to *London*, by an application to the Court of Chancery on petition, without an Act of Parliament, it was resolved, at the general annual meeting, by twenty-three against two votes, that a petition should be presented to the Court, for the removal of the charity. All the trustees in whom the property of the charity was vested, were willing to continue to act in the trusts, except *William Rayner Wood*, who declined to concur with his co-trustees, alleging that the application of the college funds to *London* objects would be, not merely a departure from the terms of the original foundation, but would endanger the object for which that foundation was intended; and he and two others were dissentients.

The Petition now came on for hearing.

The *Solicitor-General*, and Mr. *M. M. James*, for the Petitioners, contended, that the great and paramount design of the founders and trustees of the charity, throughout, was to meet with a place, from time to time, which would afford a sufficient supply of lay students to associate with the clerical students, in a large and comprehensive seminary, and so, by the help of the former, to obtain for the latter a theological education. And accordingly, when the lay students in *Warrington* dwindled down to an insignificant number, the institution was removed to *Manchester*. Again, for the like reason, it was removed to *York*, and from *York* back again to *Manchester*. All these removals were made merely in pursuance of a resolution of the trustees, whose right to act seemed never to have been questioned. Their primary

ry and special object was the education of young n for the sacred ministry, but, at the same time, both principle and as a means to an end, their various demies, wherever and however established, were to open to all, without distinction and without any reous subscription or test. The exigencies, therefore, the case compelled them, from time to time, to open ir seminaries, wherever there was any hope of maining them; and the management of the charity was ays vested in a majority of the trustees. That this racter of the charity still subsisted, of being regulated, n time to time, by a majority of the trustees, and of ng migratory, according as it might be deemed by the stees expedient for the interest of the body. And it had, in fact, moved about, from place to place, etofores, as suited the convenience of the body, so it s now capable of being legally transferred from *Manchester*, its present locality, to *London*; and a simple olution of the trustees was sufficient to authorize as no doubt the Court will hold, on the fair conuction of the trusts. They cited *Attorney-General* The Corporation of *Ludlow*(a); *Attorney-General* v. e Earl of *Devon*(b); *Attorney-General* v. Bishop of *orcester*(c).

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Mr. *Busk* for thirteen of the trustees, not Petitioners, t in the same interest.

Mr. *Roundell Palmer*, and Mr. *Amphlett*, for Mr. *W.*

Wood, took a preliminary objection to the jurisdicn of the Court, and contended, that the question at ue between the parties, and the objects contemplated the petition, did not come within the provision of : act, which was an "act to provide a summary remedy

a) 2 Ph. 685.

(b) 15 Sim. 193

(c) 9 Hare, 328.

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remedy in cases of abuses of trusts created for charitable purposes." That the act, although intituled an act to remedy abuses of trusts, also authorized orders to be made under it for the administration of any trust for charitable purposes; but as the jurisdiction under the act, upon petition, had been held to extend only to simple breaches of trust, so the jurisdiction, by petition, in cases of administration of charitable trusts, should not be extended beyond carrying the trusts simply and strictly into execution; *In re the Suir Island Female Charity School*(a); *Re Reading Dispensary* (b). That in this case, the Petitioners extended their objects far beyond simple administration of a trust, for they were remodelling the charity altogether. That the charity was of a strictly local character, the very ground of its establishment at *Warrington*, in the year 1754, being, that there was a total deficiency of academies in that the northern part of the kingdom; and therefore an effort was made to supply that defect. That there could be no question, therefore, that the removal of the charity to *London* was inconsistent with the original design and object of its establishment, which was to benefit that part of *England* in which it was originally and was now located. That if that were so, the petition must be dismissed. Besides, it was not expedient for the well being of the charity itself, that it should be removed to *London*, where the young men would be exposed to greater temptation than at present. They cited *Attorney-General v. Earl of Stamford*(c).

Mr. *Wickens*, for the Attorney-General.

The Solicitor-General, in reply.

The MASTER of the ROLLS reserved judgment.

The

(a) 3 *Jon. & L.* 171. (b) 10 *Sim.* 118. (c) 1 *Ph.* 737.

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April 13.

The MASTER of the ROLLS.

This is a petition presented under the statute of 52nd of Geo. 3, c. 101, by twenty persons, who are some of the trustees of the charity called "The *Manchester New College*," praying a declaration that it will be for the benefit of the institution that it should be established in *London* as a theological institution, for the purposes for which it was originally founded, and to be in connection with University College, *London*; and that notwithstanding such removal, the rents of the property belonging to the charity may be paid by the trustees as the committee shall direct, and, if necessary, for a scheme for the future management of the charity. The charity was established in the year 1786. It is so constituted, that every annual subscriber of two guineas and upwards, and every donor of 20*l.* and upwards become trustees, who conduct its affairs by a committee elected from themselves. The charity is possessed of considerable property, part of which, consisting of certain estates in *Yorkshire*, is vested in *William Rayner Wood* and about twenty other persons, in trust for the institution, and also of 500*l.* three and a quarter per cent. Bank Reduced Annuities, standing in the names of *William Rayner Wood* and two other gentlemen, and 3,700*l.* in debentures in the names of Mr. *Turner* and Mr. *William Rayner Wood*. Mr. *W. Rayner Wood* is also one of the committee of management and one of the Respondents to this petition. In *February* last, when this petition was presented, the number of trustees was 195. To each of them was sent a circular, requesting an opinion as to the propriety or expediency of transferring the charity to *London*. To this application, fifty-five appear to have sent no answer. Of the remaining 144, 141 approved the transfer, and three disapproved, one of whom

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whom also approved of the opposition of Mr. Wood and has taken an active part in opposing this petition. If the question which I have to decide had depended upon whether it would be advantageous to this institution, that it should be transferred to *London*, it would undoubtedly, be a circumstance having great weight with me, that only four out of so numerous a body of trustees should have thought proper to express their dissent to the project, and that only two of them should have offered active opposition to the proposed scheme. The point, however, which I have to decide is not affected by the question of expediency, but depends upon the question, whether the proposed transfer is in accordance with the views and objects of the original founders and the laws which they have established for the regulation of the charity. The Petitioners contend, that the majority of the trustees can, according to the original and fundamental laws of the institution, determine in what place it shall be carried on. The Respondents dispute that proposition, and contend, that the charity was established for the benefit of *Manchester* and the northern parts of *England*, and that to remove it from *Manchester* is inconsistent with the objects for which it was founded, and is not warranted by any of the laws by which it must be governed.

To determine this question, it is necessary to examine the origin of the institution, and to consider the documents of foundation and the laws then established for its regulation and management. But before doing so I must notice a preliminary objection taken by the Respondents to the jurisdiction of the Court, by whom it is contended, that the relief prayed by this petition does not lie within the provisions of the statute of 52 Geo. 3, c. 101, as they have been construed by the decisions in Chancery and in the House of Lords. The

word—

words of the statute would appear to be comprehensive enough to include this case, unless it is prevented by the construction put upon them by reported decisions. The words are these:—"In every case of a breach of any trust, or supposed breach of any trust, created for charitable purposes, or whenever the direction or order of a Court of Equity shall be deemed necessary for the administration of any trust for charitable purposes."

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It is impossible, it should seem, to use wider expressions; and unless therefore the natural effect of them is controlled by the decisions of the Court, I should not entertain any doubt that they comprise this case.

I think it unnecessary to go, in detail, through all the authorities which relate to the jurisdiction to be exercised under this statute (*a*). The narrow limits originally imposed by the earlier authorities have been relaxed by some later ones. It may, however, I think be said, that the decided cases have cut down the operation of the general words of the act to cases which arise between the trustees and *cestuis que trust* of the charity, and that even in cases of this latter description, the Court must exercise a discretion, as to whether the act can be applied with advantage to the charity. In the *Attorney-General v. The Bishop of Worcester* (*b*), Lord Justice *Turner* seems to have been of opinion, that the act might, at all events, be safely resorted to, in all cases where no separate and conflicting interests existed between the objects of the charity, and where therefore the Attorney-General represents them all. I concur with that observation, but without saying any more than that learned Judge has done, that the statute is to be confined to such cases.

Applying

(*a*) See the cases collected, 14 *Beav.* 120, n. (*b*) 9 *Hare*, 328.

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Applying these observations to the present case, it manifest, that this is not one in which any question arises between the trustees and strangers; neither is one where the objects of the charity have separate and conflicting interests. No discovery is wanted, no breach of trust is complained of, no question of property or liability to account is to be hostilely discussed, either between the charity and strangers, or between different sections of the *cestuis que trust* interested in the charity; but it is a case, where the direction of the Court is required for the administration of the trusts of the institution. To compel parties to file an information, for such purpose and in such circumstances, would be to put the charity and the persons interested in its funds to a useless and wanton expense. It has been urged, that I ought to allow this objection, because it has been held, that an appeal lies from an order of the Master of the Rolls, upon a petition under this act, except to the House of Lords. I do not adopt that view. In all cases, whether an appeal lie to one tribunal or to more than one, or none, it is alike the duty of the Court to ascertain the facts, and to weigh the reasons on both sides with the utmost care, with a view to administer justice to all the parties concerned; and when the Court sees its way clearly to its conclusion, it is bound to act upon it, regardless of the consequences. I am of opinion, upon the fullest consideration that I can give, that this is a case in which the Court has jurisdiction, and I cannot shrink from exercising it, from any motives of delicacy which might dispose me to wish, that no decision of mine should be incapable of being reviewed by the Lord Chancellor or by the Lords Justices of Appeal.

Recurring to the principal question, it is necessary to examine into the circumstances and documents of the original

original foundation of the institution, which are peculiar and unusual.

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In ordinary cases, some will or deed of foundation or charter of incorporation exists, by referring to which and ascertaining the meaning of the words there used, the question may be determined. In cases where the original instrument of foundation has been lost, the intention of the original founders must be inferred, as well as it can be, by the practice which has regulated the proceedings of the charity. In the present case, no such document exists in the shape of any will or deed or charter, but the only document or instrument of foundation which exists, from whence the conclusions which are to govern this question are to be drawn, consists of the report of the proceedings of certain persons, assembled at a meeting held on the 22nd of *February*, 1786, printed and distributed by the authority of the meeting, and authenticated by the signature of the chairman.

In order fully to understand and appreciate its character and effect, it is necessary to refer to the circumstances which gave rise to it. In *July*, 1754, an academy had been founded for the education of youth belonging to the class or religious denomination of English Presbyterian Protestant Dissenters. It was established at *Warrington* in *Lancashire*, as a temporary settlement, where it was carried on for some years, but was discontinued in the early part of 1783. Some attempts were made to revive it in 1784 and 1785, which failed of effect. And on the 7th *February*, 1786, forty-five gentlemen signed and presented an address to the Rev. Dr. *Barnes* and the Rev. Mr. *Harrison*, two gentlemen of distinction, residing at *Manchester*, and belonging to the class of Dissenters I have mentioned. In this address, the gentlemen whose names were sub-

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scribed to it, after lamenting the dissolution of the *Warrington* academy, and their persuasion, that an institution on the same liberal principles might be established at *Manchester*, united in requesting Dr. *Barnes* and Mr. *Harrison* to engage in this undertaking, and to give their final decision at the meeting to be held on the 22nd of *February* then instant. Accordingly, at the meeting so held, Dr. *Barnes* and Mr. *Harrison* delivered an answer, in writing, to this address, in which, after stating that they had maturely considered the proposal, and that they were persuaded there was much need of such an institution in that part of *England*, they expressed themselves willing to devote their abilities to a service so nearly connected with the interests of learning, of virtue, and of religion. The meeting thereupon passed certain resolutions, which, together with the address to Dr. *Barnes* and Mr. *Harrison* and the answer of those gentlemen, is set forth in this report. The report itself is of this character:—It opens with a statement of the agreement to establish an academy in *Manchester*, and the object of the institution. It then states, in the three following sections, the reasons for placing it at *Manchester*: it then proceeds to set forth seventeen resolutions, framed for the constitution and regulation of the institution. These appear to me to be three separate and distinct portions of the report. The first paragraph states the object to be the establishment of an academy, on a plan affording a full and systematic course of education for divines; and preparatory instruction for the other learned professions, as well as for civil and commercial life; and it states, that it would be open to young men of every religious denomination, from whom no test or confession of faith would be required.

Notwithstanding that this is the statement of an agreement, that an academy should be established at
Manchester,

Manchester, the passages I am next about to refer to, lead me to the conclusion, that there were two distinct things in the minds of the founders at this time: first, the establishment of the academy, and secondly, the place where it was to be situated.

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The object was universal, and the primary part of which seems to have been to afford a systematic course of education for divines, and the secondary part of it to afford preparatory instructions for other learned professions, as well as for civil and commercial life, and the whole institution was especially devoted for the purpose of affording these advantages to the class or denomination of persons commonly called English Presbyterian Protestant Dissenters.

The next question was, where it was to be; the reasons for placing it at *Manchester* are three:—

1. That no place of education for youth, on the liberal and extensive plan proposed, existed within the distance of more than 100 miles; that the great populousness of this vicinage, the opulence of the inhabitants, the number and respectability of the Dissenters, and the increasing taste for learning, insure both adequate support and a constant succession of pupils.

2. That the town is remarkable for a well regulated police, and for a serious attention to the duties of public worship, and that the industry, ingenuity and enterprising spirit which characterized the people, cannot fail to influence by example, and may catch the minds of youth by a surer and powerful sympathy; that *Manchester* contains one of the largest public libraries in the kingdom, to which access may be had at all stated times; that the library and philosophical society have avowed a generous zeal to foster rising genius, to incite emulation,

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emulation, and to give energy to the powers of the human mind by calling them forth into early exertions; and that it may be presumed, they will admit the senior academics to attend their more instructive discussions; that another institution established here may furnish opportunities for acquiring both the practical and theoretic knowledge of chemistry, anatomy, physiology, and other branches of science, to which students of medicine may add attendance at the hospital; that able masters of French, Italian, music, writing, drawing, and merchants' accounts, are settled in the town, and that these several means of improvement lie within so small a compass, as to be perfectly compatible with each other.

3. That Dr. *Barnes* and Mr. *Harrison* had been induced to undertake the conduct of the academy: and in this section are then set forth the address to those gentlemen, and their written answer, to which I have already referred.

The reasons so given for selecting *Manchester* as the spot where it was to be placed, appear to me to point, not to the conferring of a benefit on that town, or even on that district, but because the establishment of it *Manchester*, or in that neighbourhood, would conduce much to the success of the institution. Thus the reasons stated in the first section are, that as there is no such establishment within 100 miles, and as there are many Dissenters inhabiting that neighbourhood, adequate support and a constant succession of pupils, may be expected; that is, the support of the academy, not the benefit to the neighbourhood, is the leading motive here expressed. The second section is still stronger. The police, the character of the inhabitants, the facilities afforded for the acquisition of literary attainments, of scientific knowledge, and of modern languages, are all selected, showing

showing the advantages which the institution itself would derive from the neighbourhood, but none of them show any intention to benefit the neighbourhood by the establishment of the institution in that spot or in that vicinity. The third reason is also obviously, as I think, pointed in the same direction. To ensure the success of such an academy, it was, above all things, essential to secure the assistance of eminent Presbyterian divines, in conducting the institution. Dr. *Barnes* and Mr. *Harrison* were well fitted for this purpose, but these gentlemen resided at *Manchester*. In order to insure their co-operation, the academy must be brought to them, and consequently, their assistance is mentioned in the third section, as strongly supporting the expediency of establishing the institution in that part of *England*. And this reason, so urged, is the more important, because it is impossible to read the history of this institution, and not to observe, that its success has mainly depended, and must probably hereafter mainly depend, upon the peculiar fitness and competence of the gentlemen who may be selected, as the head of the establishment, to conduct the religious instruction.

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It is urged, with truth, that the universality of the object of a charity does not prevent the benefit of some particular place or neighbourhood being a leading object of the institution; as, for instance, the formation of a grammar-school, which may be accessible to all persons, though, even in these cases, there are usually local advantages conferred upon persons residing in the immediate neighbourhood which marks this object. But here, besides the universality of the object, which is plainly intended for the benefit of the whole kingdom, so far as the training of persons for the sacred ministry is concerned, and besides the absence of all local advantages to persons residing in the neighbourhood, the

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place where it is situated is referred to only as a means for securing the success of the undertaking. Up to this point, therefore, of the report, I am of opinion, that what the object expressed by the founders of the charity was the establishment of an academy, for affording a full and systematic course of education, as above described, and that the establishment of it in *Manchester* was but an accessory only, because that place was considered most favourable to the undertaking.

The rest of the report must be examined, in order to ascertain whether it alters the conclusion drawn from the portions on which I have commented. This consists of the seventeen resolutions come to for the purpose of constituting and managing the institution; the first states, that this is an attempt to establish a seminary of learning, similar in its objects and in its plan, to the late *Warrington* academy. This does not go far, because it uses the word "similar" only; but as far as it has any reference to the subject before me, it is favourable to the case of the Petitioners, inasmuch as it is certain that the *Warrington* academy, although founded to provide like instruction, was not limited to any particular situation. The next six resolutions have no bearing on the subject. The eighth provides for the annual appointment of a committee, at a general meeting of the trustees to be held at *Manchester* on the *Wednesday* after the anniversary of the institution.

The ninth appoints the first committee. The tenth defines a trustee. The eleventh provides for the remuneration of Dr. *Barnes* and Mr. *Harrison*. The twelfth authorizes the committee to obtain subscriptions for the establishment and support of the institution, calling it by the name of the *Manchester* Academy. The thirteenth provides for making application for assistance to further the object of the institution. The fourteenth

teenth provides for the erection of suitable buildings. The fifteenth is in these words :—" That these constitutions and regulations shall not be altered, but by a majority of votes, taken by ballot, at the annual meeting of the trustees; and that after the experience of three years, they shall undergo a due revisal, and then be established into a code of laws, not alterable but by the votes of three-fourths of the trustees present at their annual meeting." The sixteenth approves of a similar institution in the neighbourhood of *London*; and the seventeenth and last requests the committee to announce to the public the institution of the academy, and to print and distribute a report of the proceedings of the present meeting, authenticated by the signature of the chairman, which was accordingly done in the document I am considering. The only two circumstances in these resolutions which appear to militate against the conclusion I have come to on the former part of the report, are, that in the eighth, the annual general meetings are directed to be held at *Manchester*, and that, in the twelfth, the institution is termed the *Manchester Academy*. The former is, in my opinion, a trifling circumstance. It was obvious, that the general meetings must be held in some appointed place, and the circumstance of appointing *Manchester* for that purpose, does not, in my opinion, fix it irrevocably to that spot.

The name *Manchester Academy* is more important, but this is not sufficient to control what, in my estimation, is the conclusion to which the rest of the report leads. Assuming that *Manchester* and its vicinity was not intended to be specially benefited above other parts of the kingdom, it would still have been necessary to give the institution a name. The obvious and best name that could be selected would be, to designate it by the place where it was situated, even though it were

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intended to establish it there only temporarily. That the academy at *Warrington* was called the *Warrington Academy*, although it was unquestionably placed there as a temporary settlement only. But the effect of the expressions, even if they were more conclusive than they appear to me to be, would be neutralized by the fifteenth resolution, which provides for the alteration, by the trustees, of these very resolutions and constitutions as they are termed. The meaning of which I understand to be this:—that the original scope and object of the institution (*viz.* the providing a systematic course of education as above described), is not to be altered; but that the constitutions and resolutions carrying that object into effect are (subject to the instructions imposed by this fifteenth resolution) liable to alteration by the trustees, in such manner as they shall consider most conducive to the main scope and object of the original design. And by a subsequent resolution, passed on the 11th of May, 1786, it was resolved:—"That if, from unforeseen circumstances, this institution shall, in the opinion of the trustees, present at two successive meetings formally convened with an interval of at least fourteen days, cease to answer the valuable purposes for which it has been established, the remaining property shall be divided amongst the remaining benefactors and their legal representatives, in proportion to their benefactions, provided the same be claimed within one year after such determination of the trustees."

The result, therefore, to which I have come, upon the examination of this report (the only instrument of foundation) is, that the placing of the institution at *Manchester* was not one of the main objects of the charity, but that it was accessory only, and subservient to the carrying into effect that which is expressed to be its main scope and object. The subsequent course

of proceeding and practice of the institution confirm my opinion, drawn from the document on which I have commented.

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Thus, on the retirement of Dr. *Barnes*, a general meeting of the trustees was summoned for *July*, 1797, to consider whether the seminary could be continued under the then existing circumstances, beyond *Midsummer*, 1798, or whether the funds could be applied more advantageously in any other situation. It is obvious, that the committee who called that meeting considered that, consistently with the original object of the institution, the funds might be advantageously applied for the same purposes in a situation other than that of *Manchester*. After some discussion, and under the superintendence of the Rev. *George Walker*, the institution was continued at *Manchester* till 1803, when Mr. *Walker* resigned. The same difficulty was again felt, of getting a proper person to conduct the establishment, and much discussion took place, which finally led to its removal to *York*, in order that, by this means, the superintendence of the Rev. Mr. *Wellbeloved*, who resided in that city, might be obtained. At this time (being but sixteen years after the original foundation of the institution) many of the original subscribers and trustees must have been alive; and yet it is impossible to read the documents, which show the discussions which occurred as to the places to which the institution might be removed, and the resolutions passed, without coming to the conclusion, that, at least in the estimation of the then existing trustees, the leading object of the institution was the education of young men for the sacred ministry, and that the spot where the institution was to be placed was but a secondary and subordinate consideration. Accordingly, the propriety of selecting *Birmingham*, *Leeds* or *York*, was discussed, solely with the view

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view of ascertaining which of those places would best promote the design of the institution. And it is manifest, that so important was it considered, for the success of the charity, to procure the services of some eminent divine, that the attainment of that object would, in the opinion of the then existing trustees, have justified the removal of the academy to any part of the kingdom. It was with this view, that the removal took place to *York*. At *York*, it seems to have flourished much, under the care of the Rev. Mr. *Wellbeloved*, and acquired some valuable property. On the retirement of that gentleman, in 1839, the academy was brought back to *Manchester*, not, as it appears to me, with any view of rectifying a breach of trust supposed to have been occasioned by its transfer to *York*, but because it was considered, by the majority of the trustees, after considerable doubt and discussion, that it would flourish best in that neighbourhood. This practice was consistent with what I believe, from the documents before me, to have been the original design of the institution, which, I again repeat and which should always be borne in mind, was to train young men of the denomination of Dissenters to the sacred ministry. And it is my opinion, that the selection of any situation, and the adoption of any course of instruction that would best accomplish that end, was within the powers confided to the trustees for the time being by the original founders.

It follows, therefore, that in my opinion, it is in the power of the trustees, without any breach of duty, to transfer this institution, from time to time, to such places as shall, in their opinion, fairly and reasonably exercised after due investigation, be best calculated to further the object for which it was founded. The case has not been argued before me on the ground that the transfer to *London* is a corrupt exercise of that power
 by

by the trustees, nor could it, on the existing facts, have been so argued. The trustees have, in my opinion, a discretion reposed in them, which it is their duty to exercise in the manner they consider to be most advantageous to this institution. And although this Court might interfere to restrain a corrupt or plainly self-destructive exercise of that discretion, no such case is laid before me. Both the Petitioners and the Respondents have been, as I believe, actuated by a *bonâ fide* desire to discharge their duty in the course they have adopted. I abstain, therefore, from expressing my opinion as to the propriety of the course which the trustees propose to adopt. It is obvious that they have, or can procure, better means of judging of that subject than the Court could do, even if that point were properly before it; and it is also clear, that a large majority of the trustees actively approve of the proposed transfer, and that only three or four actively disapprove of it. That question, however, I repeat, does not come before me. All that I decide is, that the course which the trustees propose to adopt, lies within the scope of their power and authority, and that it is consistent with the original object for which the charity was founded, and that in taking this course, they appear to me to be animated by a sincere desire properly to discharge the duties reposed in them.

I propose, therefore, to dispose of the present petition, by making a declaration to this effect, viz. :—Declare, that it is consistent with the original scope and object of this institution that the same should be transferred to *London*, or to such other place as, in the opinion of the majority of the trustees, for the time being, shall be best calculated to advance the objects and design of the institution. And that it is in the power of the majority of the trustees, for the time being, to transfer the same accordingly,

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accordingly, and to apply the rents, interest and income of the property held in trust for the said institution, according to the directions of the committee of management, notwithstanding such transfer. Probably this declaration will be sufficient to induce Mr. *William Rayne Wood* to pay over the income he receives, as he has been used to do, according to the direction of the committee appointed by the trustees. But if desired, and it be considered to be any indemnity to him and the other trustees of that property, I will make an order to that effect. This was, in my opinion, a proper question to be submitted to the decision of the Court, and I am of opinion, therefore, that the costs both of the Petitioners and of the Respondents, as between solicitor and client, should be paid out of the funds of the charity; but they must be paid out of the income, and not out of the capital, belonging to it.

March 1, 2,
3, 4.
April 14.

ROCHDALE Canal Company v. KING.

By a canal act, mill owners were empowered to use the canal water merely for "condensing" steam. In 1829, *King*, being about to

BY the *Rochdale Canal Company Act* (a), it is enacted, "that it should be lawful for the owners of any lands within the distance of twenty yards from the said canal, to take water from the canal for the sole purpose of

(a) 34 Geo. 3, c. lxxviii.

erect a mill, applied to the company for leave to take water for "generating" as well as "condensing." The company did not appear to have refused the application, the pipes were laid down in the presence of their engineers. The mill being built on the principle of using the canal waters for both purposes, and having been used in that way down to the present time, this Court, although the company's right had been established at law, held, that they were bound by their acquiescence, and refused a perpetual injunction to restrain *King* from taking water for the purpose of "generating" steam.

An injunction was however granted as to another mill, acquiescence and encouragement on the part of the company not having been established.

Of the two objects of a bill, one succeeded and the other failed. The costs being easily separable, a decree was made without costs on either side.

purpose of condensing the steam used for the working of any such engines," i. e. for steam engines used in manufactories adjoining the canal. The Defendants, and the other mill-owners on the banks of the canal, used low-pressure engines, in which the water used for condensing the steam, is usually employed to feed the boiler for generating fresh steam.

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Two mills of the Defendant were erected by *James King*, the father of the Defendant; one in 1829, and the other in 1841. While constructing the former, *King* made a written application to the company for leave to use the water, both for generating and condensing steam. The company's engineer attended to see the pipes introduced into the canal without injury.

The mills, however, being built, like all the other mills, upon the principle of using the canal water for both purposes, *James King* continued to use it for generating and condensing steam, and also for making sow or size. In 1838, formal notice was sent, by the company, to *James King*, that he would not be permitted to use the water for other than the purposes authorized by the act.

In 1841, he built a second mill, and after asking leave to use the water for "condensing" only, he used it also for generating as well as condensing steam, and for making sow or size, and for heating the mill. The company objected to this, and, after some correspondence, they, in 1847, commenced an action, which resulted, in 1851, in a decision, in the Exchequer Chamber, that the act allowed the use of the water merely for condensing the steam. The company thereupon filed their bill for a perpetual injunction. The Defendant resisted it, on the ground of acquiescence, and on the principle of the Plaintiff's standing by and encouraging the outlay of money by the Defendant.

Mr.

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Mr. *John Baily*, Mr. *Wickens*, and Mr. *Rendall*, for the Plaintiffs, cited *Rochdale Canal Company v. King*(a); The Master, &c., of *Clare Hall v. Harding*(b); *Williams v. Earl of Jersey*(c); *Willan v. Willan*(d); Duke of *Devonshire v. Eglin*(e).

Mr. *R. Palmer*, Mr. *Glasse*, Mr. *J. J. H. Humphreys*, and Mr. *Spinks*, for the Defendants, cited *Dann v. Spurrier*(f); *Powell v. Thomas*(g); *Anon.*(h); *Gray v. Chaplin*(i); *Jones v. The Royal Canal Company*(k); *Graham v. The Birkenhead, &c., Company*(l).

Mr. *John Baily*, in reply.

The MASTER of the ROLLS reserved judgment.

April 14. The MASTER of the ROLLS.

The question in this cause is, whether the Plaintiffs are entitled to obtain an order from this Court, to restrain the Defendants from making use of the water of the *Rochdale Canal* for any, and, if any, for what purpose, other than the mere purpose of *condensing* the steam in the steam engines used by them.

In the year 1794, the act passed for making and maintaining the *Rochdale Canal*. By the 113th section, after reciting, that whereas steam engines in manufactories promoted the interest of the canal, by the payment of tolls, it was enacted, that it should be lawful
 “for

(a) 2 *Sim. (N. S.)* 78.
 (b) 6 *Hare*, 273.
 (c) *Cr. & Phil.* 91.
 (d) 16 *Ves.* 72.
 (e) 14 *Beav.* 530.
 (f) 7 *Ves.* 231.

(g) 6 *Hare*, 300.
 (h) 2 *Eq. Ca. Abr.* 522.
 (i) 2 *Russ.* 126.
 (k) 2 *Moll.* 319.
 (l) 2 *Macn. & G.* 146; 2 *H. & Tw.* 450.

“for the owners of any lands within the distance of twenty yards from the said canal, to take water from the canal for the sole purpose of condensing the steam used for the working of any such engines.” The Defendants are the owners and occupiers of two mills within the limits prescribed, on the banks of the *Rochdale Canal*. In steam engines, other than high pressure engines, used for manufacturing purposes, a portion of the water used for condensing the steam is commonly employed to feed the boiler. A question arose between the Plaintiffs and persons who, like the Defendant, have mills worked by steam on the banks of the canal, whether this clause limited the rights of the mill-owners to the use of water for condensing purposes only. The limited construction of this clause has been settled, by a final decision in the Exchequer Chamber, and no question now arises on this point. The Plaintiffs having obtained the decision at law in their favour, filed this bill, for the purpose of obtaining a perpetual injunction, to restrain the Defendants from using the water for any purposes, other than the exclusive purpose of condensing steam. It is admitted, that the Defendants, besides using the water for condensing steam, have employed it to feed the boiler, to warm the mill, and to make sow or size. The Defendants contend, that they are entitled to continue this practice, not by reason of the provisions of the act, but because the Plaintiffs have, not only acquiesced in their so doing, but have knowingly permitted the Defendants to construct their mills, on the principle of using the water of the canal for other than condensing purposes, and that having done so, they cannot now complain of the conduct of the Defendants. The principle on which the Defendants rely is one often recognized by this Court, namely, that if one man stand by and encourage another, though but passively, to lay out money, under an erroneous

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for leave to do something, which he was not entitled to demand under the authority of the act, namely, to take water for steam and injection. That is, as I read it, an application for permission to use water for the purpose of generating as well as of condensing steam. The company, on the receipt of this letter, by their proper officer, wrote to Mr. *Robert Matthews*, the canal engineer of the company, to attend to this application, which was accordingly done, and the pipes for steam and injection were accordingly laid down. It does not appear that any answer was given to Mr. *King*, informing him that injection was the sole purpose for which he was entitled to take water, and for which it would be permitted to be taken. No entry or memorandum to that effect, or leading to such an inference, is to be found in the books of the company.

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If the matter, therefore, remained here, I should be of opinion, that *James King* had made an application to be allowed to use water for authorized and unauthorized purposes, and to lay down pipes to effect this object; and that thereupon, the Plaintiffs had directed their engineer to superintend the work, so far, at least, as to see that no injury was done to the canal in effecting this object; and if, from that time till the commencement of the action, no active step had been taken by the company, to interfere with or prevent *James King* from using the water so taken, for the purposes of steam, a clear case of acquiescence to that extent would, in my opinion, have been established.

To rebut this, it is urged by the Plaintiffs, first, that the inference which might be drawn from the construction of this mill of the Defendant, is repelled by the fact, that *Matthews*, the engineer, at the time of such construction, gave *James King* distinct notice, that he
would

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would not be allowed water for any but condensing purposes; and secondly, that the effect of the abstinence to take legal measures to prevent this use of the water, is removed by the fact, that various notices were sent by the Plaintiffs to the Defendants, and to the other millowners, protesting against the unauthorized use of water. On the first point, it is essential to read the evidence of *Robert Matthews*. He says, "I then told him he would not be allowed to use the water for any other purpose than condensing purposes, except he agreed with the Company. On the 19th *March*, 1829, and before I left the premises, I made a note, in my memorandum book, of what I told *James King* the elder. I made that note in his presence. The note is as follows:—'*March* 19, 1829.—Put in the pipes for Mr. *James King*, and he was told, at the same time, that he would not be allowed to use the water for any other purpose but condensing purposes.' The same words are repeated in ink, in my own handwriting, on the same page of said produced book. I wrote the memorandum in ink on the night of the same day, when I got home." I attach very little value to this evidence. The application had been made in writing to the company for water for steam, as well as for condensing. The company, in answer, do nothing except to direct *Robert Matthews* to attend when the pipes are laid. *Robert Matthews* says, that he always gave this information to the millowners, and that he did so by the order of the committee; if so, no trace has been preserved of any writing, either in or out of the books of the company, by which *Robert Matthews* was ordered to give such notice; he does not say, that he gave this notice in consequence of any special direction on the particular occasion of *James King's* application, but that he did so uniformly; and this is the more worthy of notice, because the books of the company do contain several entries on this subject,

such

such as the eighth resolution of the 24th of *February*, 1820, and the eighth order of the 19th of *February*, 1825, and, in addition to this, a special order in writing, from the treasurer to *Robert Matthews*, on the 25th of *November*, 1811, "to examine from whence Mr. *William Sutcliffe* has his supply of water for his boiler, as the treasurer is apprehensive that his intention is to serve the boiler out of the canal."

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But either it was the duty of *Robert Matthews* to give these notices to the millowners and see whence they obtained this water for steam on the construction of the mill, or it was not. If it was not his duty, this notice to *James King* was worth nothing, but if it was his duty to give such notices to the millowners, and to ascertain that the water was not applied for other than injection purposes, then I must consider that he, and the company through him, distinctly knew what it was his duty to know, namely, that *James King* was constructing his mill in such a manner, that the boilers were to be fed from the canal. The entry in the book of *Robert Matthews* is of a very singular description. Why it should have been repeated in ink, and why on that particular occasion, this entry should have been made, unless he had reason to believe that *James King* was about to use the water for unauthorized purposes, does not appear. According to his evidence, the notice he gave and the entry in the book do not correspond, for the notice he gave *King* was, that he would not be allowed water for any other purposes but condensing purposes, *except he agreed with the company*; but the entry in the book is silent as to the possibility of any agreement with the company. If *Robert Matthews* gave this notice to every one indiscriminately, as he states it was his uniform practice to do, and if, as appears by the evidence, all the mills were constructed on the principle of feeding the

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the boiler with the water from the canal, notwithstanding this uniform notice, in that case I think, that *James King* might justly disregard it as an idle form, and the more so as he had himself expressly applied to the company to be allowed water for steam, as well as injection, and had received no answer refusing him such permission, nor indeed any notice beyond a mere direction to the engineer to attend and see that the laying of the pipes did not injure the canal. *Robert Matthews* does not state what answer *James King* gave to this communication. If none, it is probable that he considered it as a mere idle form. If he did give an answer, it ought to have been stated, as it must probably have contained either an admission or a denial of his intention to use the water for unauthorized purposes. In either case, the course adopted or omitted to be adopted by *Robert Matthews* becomes material. The result is, that in my opinion the evidence given by *Robert Matthews* does not destroy the inference to be drawn from the remaining facts which accompanied the construction of the first mill of the Defendants.

The next matter to be considered is, the effect of the notices given by the company, respecting the unauthorized use of water drawn from the canal. These were as follows:—On the 24th of *February*, 1820, a resolution was passed by the company to this effect, “That all persons who have illegally taken water belonging to the company in *Manchester*, be applied to to make compensation for the water so taken, and to desist from taking any more, without previously making special contracts with the company for such privilege in future.” In pursuance of which, a circular was sent on the 25th of *March*, 1820, to fourteen mill-owners, in these terms:—“Sirs,—It having been represented to the gentlemen of the committee of this canal, that you are making use
of

of the water belonging to the said canal without any authority for so doing, whereupon they passed the order as follows" (which is that which I have read).—"I shall be obliged by being favoured with an early answer hereto, and beg to observe, that if the same shall not be satisfactory, or that I am not favoured with any reply, I must hand the business to Mr. *William Redfern*, the law clerk to this company, to whose name this introduces you." Most of the millowners seem to have returned answers admitting the use of water for other than condensing purposes, none apparently resisting payment for the use of the water, some asking what was required by the company, others suggesting that it was too minute to be noticed, and others promising to look into the act, and to conform to its provisions.

Again, on the 19th of *February*, 1825, an order was made by the company, to this effect:—"That the treasurer inform the different persons who take water from the canal, for purposes not authorized, that it is intended, as soon as convenient, to stop up the communications by which such water is taken; but that the company have no objection to furnishing water on reasonable terms, provided they (the millowners) can make the same acceptable to the other parties interested." On the 13th *May* following, a copy of this order was sent to fourteen millowners, with a letter, signed by the treasurer, in these words:—"I am to transmit you, as below, an order passed by the gentlemen of the committee of this canal, to which your attention is respectfully requested." I only find one answer to this circular set forth in the evidence. It is that of Messrs. *Murray*, of the 16th *May*, 1825, in which they expressly state, that they take water from the canal for the purposes of the steam engine, and for the purpose of heating the mills, and offer to allow the inspec-

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tor of the company to examine the mills in order to see what is done. It does not appear from the evidence, that any steps were taken in consequence of this answer, or in consequence of the circular. The fact that the millowners continued to use the water of the canal for purposes other than condensing purposes, is established by the evidence of both the Plaintiffs and Defendants.

On the 23rd of *October*, 1827, notices were sent, signed by the clerk of the company, to fifteen mill-owners, of which the following is a copy:—"I am instructed by the company of proprietors of the *Rochdale Canal*, to give you notice, that in case you take any water from the said canal, after the receipt of the notice, for any purpose whatever, contrary to the provisions contained in a certain act," then setting it out, "without first obtaining the consent of the committee of the said company of proprietors, legal proceedings will forthwith be commenced against you." To this circular two answers only appear in the evidence. They express a desire to do no injury to the canal, and to give all necessary explanations. None of these circulars were sent to *James King*, who was not then a mill-owner, nor is there any evidence to show that he was cognizant of them. The practice went on exactly the same after the remonstrances of the company as before. They seem to have been avowed by the millowners, and the company took no steps to prevent them. They might, if they had thought fit so to do; and, in case the millowners had not come to terms with the company, they might then have adopted the course which was taken in 1847, namely, have brought an action, or that which was adopted in 1851, have filed a bill for an injunction.

It



It is impossible, I think, to read the evidence and the documents relating to the subject, and not to see, that although the company claimed the right of making the millowners pay for the use of water taken for unauthorized purposes, still, they knew of the fact of such use, and, in consideration of the advantages obtained by the canal company by the payment of tonnage, the canal company did not think fit to proceed to extremities with the millowners. It was, while matters were in this state, that *James King* applied, as I have above stated, for the use of water, not merely for injection, but also for steam, and to this application the company made no objection, and gave him no notice that his use of the water was to be confined to condensing purposes, but they allowed him to construct his mill upon the principle of using the water for condensing and for feeding the boiler to produce steam, which steam is used for warming the mill as well as for producing power.

I am of opinion that, so far as concerns this mill, which was constructed in 1829, I must, on this evidence, come to the conclusion, that the company have encouraged *James King* in so constructing his mill, as to derive, from the canal, water for the purposes of steam, and that they cannot now, after the lapse of eighteen years, dispute his right so to do. This does not extend to give him the right to use the water for size or saw, for which purpose, it does not appear, that any peculiar construction of the mill or works is necessary, and as to which, I have not found anything in the evidence, either to justify the Defendant or to bind the Plaintiffs by any active or passive acquiescence. Whether their acquiescence extends to the heating of the mill by steam appears to me to depend upon whether the mill was so constructed in 1829 as to apply the steam for

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this purpose. I think that the Plaintiffs had then distinct notice that *James King* intended to employ the water of the canal for the purpose of steam, in addition to the condensation thereof, and having sent their engineer to inspect the laying down of the pipes for this purpose from the canal, I am of opinion, that they must be held to have assented to his use of the water for such purposes relating to the generation or employment of steam, as the construction of his mill would manifestly and plainly have disclosed to any one conversant in such matters.

These observations however are confined to the first mill built by *James King*. With respect to the second mill, distinct evidence and a different set of circumstances have to be considered, upon which the circumstances which had already occurred have, nevertheless, an important bearing. The second mill was built by *James King* in the latter end of the year 1841. If nothing had occurred in the interval of time which had elapsed between the building of the two mills, and if his application to the company had been in 1841 the same that it was in 1829, I should have thought, that the same principle to which I have given effect, as regards the first mill, would have applied to the second mill, and the Defendants, who stood in the place of *James King*, would have been entitled to the use of water from the canal in the same manner for the second mill as in respect to the first. But the circumstances under which the second mill was built are very different. In the first place, on the 19th of *February*, 1838, *Redfern*, the law clerk to the company, wrote and sent to *James King* a letter in these words:—"Sir, the agents for the company of proprietors of the *Rochdale Canal* are apprised that the water taken or drawn by you from the said canal to your engine and works, situated at or
near

near the *Moss* Locks, for the purpose of condensing the steam necessary for the proper working of the said engine, is not returned into the said canal in the quantities and manner directed by the acts of Parliament passed for making and maintaining the said canal. I do therefore give you notice, and call upon you to return the water, so taken or drawn from the said canal for the purpose aforesaid (the inevitable waste thereof by condensing the steam only excepted) into the said canal, in the quantities and manner directed by the acts aforesaid, and of which quantities and manner you are fully aware. And I do also hereby give you notice and warning, that if you neglect or refuse to do what is here required, immediately after your receipt hereof, legal proceedings will be commenced to compel the same without further notice." The letter, though not in every respect quite clear, is distinct enough in this, that it shows the intention of the company to make *James King* adhere to the provisions of the *Rochdale Canal Act*. What, if any, answer *James King* sent to this notice does not appear.

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In the month of *October*, 1841, however, a little more than three years and a half after the receipt of this notice, Mr. *King*, being about to build his second mill, applies for water, and he does so in a letter in these words :—"To the committee of the *Rochdale* canal company :—This is to request or give you notice, that I want to lay a pipe into the *Rochdale* canal, at or near *Moss Mill*, for injection water, at your earliest convenience. Waiting your reply, I am your well-wishing friend, *James King*." It is impossible not to be struck with the difference between the two applications. The latter is confined to injection water, and is made after the time when he had distinct notice that the company insisted on adherence to the Act of Parliament, which confined

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confined the use of the water to condensing purposes only. It is reasonable to infer, that in consequence of that notice, he varied his application to the company for the use of canal water, by confining it to that for which alone the Act of Parliament authorized him to insist upon it. On receipt of this, I think the Plaintiffs were justified in supposing, that he required and intended to use the water for such purposes only as he stated, as much as if he had said "I do not ask for the water for the purpose of generating steam," and that, after receiving the application so worded, the company, if they intended to prohibit the unauthorized use of water, were not put upon investigating, to what extent and in what way he intended to use the water, or whether he constructed his mill in such a manner as displayed an intention of using the water for unauthorized purposes, as they were, when he had applied for, and had obtained tacit permission to take water for steam, in addition to taking it for injection. If, therefore, he so constructed his second mill, as to feed the boiler with the water used for condensing, he, in my opinion, did so at his own peril and risk, and he and those claiming under him cannot, unless by arrangement with the Plaintiffs, be allowed to continue such use of it. I entertain no doubt that the usual, and perhaps it may be said the almost invariable practice, in the construction of condensing engines, is, to use the water employed in condensing, for the purpose of feeding the boiler; but as, undoubtedly, condensing engines where water is abundant, are constructed on other principles in which the water used for condensing is not so employed, I cannot infer, from this circumstance, that the construction of a steam engine in which water was employed for condensing, involved notice to the company that such water was also to be employed for the purpose of generating steam, the more especially, as so to hold, would, as it appears to me, lead to a different construction

tion of the act to that which it has received at law, and by which I consider myself bound.

I am of opinion also, that the time which has elapsed, does not affect the right of the company. The mill was constructed in 1841. In *December*, 1845, the company sent a circular letter to Mr. *King*, and the other millowners, giving notice to each of them, that if he continued to take water from the canal for any other purpose than that of condensing, legal proceedings would be instituted against him. On the 31st of *December*, 1847, the law clerk of the company wrote to Mr. *King*, to the like effect, unless satisfactory arrangements were made by him with the company. Immediately after this last letter, the action at law was commenced, which was determined by the Exchequer Chamber, in favour of the Plaintiffs, in 1851, when this bill was filed. It appears, therefore, that only four years have elapsed since the construction of the second mill, during which the Plaintiffs have been engaged in steps, more or less active, and in proceedings at law, for the purpose of preventing the unauthorized use of the water by the Defendants. Although this might have disentitled them to any injunction until the hearing of the cause, yet, on the proof of the facts above stated, and their title being established at law, I am of opinion, that they are entitled, so far as regards the second mill, to an injunction in the terms of the 113th section of the act, which are the same as those of the prayer of the bill.

It appears to me, that the proper decree will be, to grant a perpetual injunction restraining the Defendants, unless by licence from the *Rochdale* canal company, from using water from the *Rochdale* canal for any other purpose than that of condensing the steam, used for working any steam engine in the cotton mills, or premises

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mises coustructed by *James King*, deceased, or by the Defendants, since the month of *February*, 1838. "And from drawing from the said canal any quantity of water, for the purpose of condensing the steam, used for working any such engines, without returning to the said canal, in every such day on which they shall use such engine, a quantity of water on the same level on which it shall be taken, equal to the quantity so taken in every day, from the said canal, for the purpose of condensing the steam in such engine, the inevitable waste thereof, by condensing such steam, only excepted." "And that the Defendants be restrained (unless by licence from the *Rochdale* canal company) from taking or using any of the water of the *Rochdale* canal, for the purpose of making sow or size." Thus worded, the order will, as I apprehend, confine the injunction to the new mill, leaving the old one untouched, except so far as regards the making of sow, and prohibiting the use of water in sizing altogether; and I think that this is a better course than to direct what I had at first intended, that the bill should be dismissed, so far as it sought any relief against the Defendants in respect of the old mill, other than and except the employment of the water of the canal for the purpose of making sow or size therein.

As the suit succeeds so far as regards the new mill, and fails so far as regards the old mill, and as, in my opinion, it would be impossible properly or accurately to separate the costs properly attributable to each, I shall make the decree without costs on either side.

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2. In 1846, an executor invested part of the assets in Exchequer bills; they were ordered into Court and sold in the same year at a loss. In 1848, it was declared by the decree, that the investment was improper, but at that time, the price of Exchequer bills had risen, so that there would have been then no loss if they had been retained. Held, that the executor ought to be charged with the amount improperly invested, and credited with the produce of the Exchequer bills in 1846. *Knott v. Cottee.* Page 77

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- A testator, by his will, made a general devise of his real estates to his nephews, charged with his debts and legacies. By a codicil, he devised a freehold house to *A. B.*, it being his wish that she should reside therein if she should think fit. Held, that the house was exempt from the charge of debts and legacies. *Wheeler v. Claydon.* 169

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USURY.

VENDOR AND PURCHASER.

CONTRIBUTORY.

1. A prospectus was issued for the establishment of a company. *A. B.* took shares and paid his deposit. Afterwards, at a meeting of shareholders, the scheme was greatly varied. *A. B.* was present, but took no part in the matter, and never after in any way interfered. The company was formed on the new scheme, and failed. Held, that *A. B.* was not a contributory. *Goldsmith's Case.* 262
2. *A. B.* took ten shares in a company intended to be formed for specified objects and on stated principles. The projectors afterwards materially varied its character. *A. B.* did no act by which he assented to the variation or adopted the new company. Some

time after the directors agreed that nine of *A. B.*'s shares should be cancelled, and that *A. B.* should remain a shareholder for one. Held, that *A. B.* was not a contributory in respect of the nine shares. *Meyer's Case*. Page 383

CONVEYANCE.

The Plaintiff by one contract purchased an estate and a judgment for 1,000*l.* Held, that he was entitled to apportion the purchase-money between the estate and the judgment, and to have separate conveyances of each. *Clark v. May*. 273

COPYHOLD.

See VENDOR AND PURCHASER, 1.

COSTS.

1. Costs of an administration suit given to an executor though charged with the consequences of an improper investment. *Knott v. Coltee*. 77
2. Solicitor, from whom a sum was found due, ordered to pay all the costs of proceedings to compel payment. *Re Dufaur and Blake-ney*. 113
3. A bankrupt executor was charged with interest on his balances, but he was allowed his costs of suit. Held, that the costs subsequent to the bankruptcy were not to be set off against his debt, which had accrued prior to his bankruptcy. *Cotton v. Clark*. 134
4. In a frivolous suit, costs given to neither side. *Clark v. May*. 273

5. Proceedings were stayed as against the legal personal representative. A petition having been presented, professing to deal with funds standing to the general credit of the cause, he was served therewith, and with a notice not to appear. Held, nevertheless, that he was entitled to his costs of appearance. *Rowley v. Adams*. Page 312

6. The costs of an application by a new master of a hospital for payment of the income of a fund in Court, held payable out of the income. *Attorney-General v. Smythies*. 385
7. Of the two objects of a bill, one succeeded and the other failed. The costs not being easily separable, a decree was made without costs on either side. *Rochdale Canal Company v. King*. 630
See ATTORNEY-GENERAL.

DISCLAIMER.

MORTGAGOR AND MORTGAGEE.
VENDOR AND PURCHASER, 8.

COUNTY COURT.

See ADMINISTRATION, 2.

COVENANT.

1. A covenant is to be construed most strongly against the covenantor. *Warde v. Warde*. 103
2. Demurrer allowed to a bill by the lessee of a coal mine to be relieved from his rent on the ground of a deficiency of the coal to be worked. *Mellers v. The Duke of Devonshire*. 252
3. *A.* demised a coal mine to *B.* at 60*l.* per acre for the coal gotten,

and B. covenanted to work not less than two acres annually or pay the rent for that quantity, "whether the same should be got or not." There was a proviso for cesser if all the coal was exhausted. At the end of the term, the lessee alleging, that there was a deficiency in the coal, and that, from "inevitable causes, it was impossible to get two acres annually, and that during the term he had paid for more than he had got," sought to recover back the excess. A demurrer was allowed, on the ground that the covenant was absolute, and the lessee was bound to pay whether he got the quantity or not, and that there was no allegation of an actual exhaustion of the coal. *Mellers v. The Duke of Devonshire*. Page 252

See DEED, 1.

LEASE, 1.

COVENANT TO SETTLE.

See MARRIAGE SETTLEMENT.

CREDITOR.

As to the right of a creditor to come in under a decree at any time before the fund has been distributed. *Hartwell v. Colvin*. 140
See DEBTOR AND CREDITOR.

CREDITORS' DEED.

Specialty creditors, whose debt carried interest, and other creditors, whose debts did not carry interest, executed a creditors' deed, by which the debtor's property was to be divided between the creditors, "rateably and in proportion to the amount of their re-

spective debts." The creditors released their debts. Held, that the specialty creditors were entitled to a dividend on the amount of interest accruing subsequent to the date of the deed. *Bateman v. Margerison*. Page 477

CREDITORS' SUIT.

See CREDITOR.

INSOLVENT ACT.

DEBT.

After a long delay the Court requires more than the ordinary proof of a debt in the Masters' office. *Hartwell v. Colvin*. 140

See CREDITOR.

EVIDENCE, 2.

DEBTOR AND CREDITOR.

As to the equity of a creditor of a partnership to obtain payment out of the separate estate of a deceased partner. *Brown v. Gordon*. 302

DECREE.

See ADMINISTRATION.

VENDOR AND PURCHASER, 12.

DEED.

1. A wife had a jointure secured on her husband's estate X. In 1844, the husband contracted to purchase an estate Y., and to enable him to sell the estate X. the wife, in 1845, released her jointure, and then covenanted to secure it out of "estates he should *thereafter* acquire." Before the estate Y. had been conveyed, the husband

contracted to sell it. Held, that in equity, the estate *Y.* was charged with the jointure. *Wardev. Warde*,

Page 103

2. By a deed, the amount due to the first mortgagee was confirmed to him by the subsequent incumbrancers, and he thereby agreed not to execute his power of sale for a limited time. Held, that a party who by his bill contested the amount so admitted to be due to the first mortgagee, could not take advantage of the stipulation in the deed not to sell within the time, and an injunction to restrain such sale was refused. *Cockell v. Bacon* 158

3. *A. B.*, a tenant in tail subject to an existing life estate, borrowed money on mortgage, and the tenant for life joined in order to bar the entail, and he covenanted to pay the interest during his life. By the same deed, the equity of redemption was resettled on *A. B.* for life, with remainder to his issue in tail, with limitations over. The Court, ten years afterwards, set aside the resettlement of the equity of redemption, on the ground that there was no proof of any contract to vary the existing limitations. *Meadows v. Meadows*. 401

See COVENANT.

CREDITORS' DEED.

MARRIAGE SETTLEMENT.

MORTGAGE, 2, 3, 5.

DEMONSTRATIVE LEGACY.

Bequest of 10,000*l.* sterling, "being my share of the capital now engaged in the banking business,"
VOL. XVI.

&c. Held to be a demonstrative and not a specific legacy. *Sparrow v. Josselyn*. Page 135

DEMURRER.

See COVENANT, 2, 3.

DEVISE.

Devise and bequest of real and personal estate to trustees for *A.* for life, and afterwards "to convey and assure" equally between all *A.*'s children, on their respectively attaining twenty-one, with a gift over on *A.*'s death without "leaving any child." There was one child who survived *A.*, and died an infant. Held, that such child did not take a vested interest; and, secondly, that the gift over did not take effect. *Walker v. Mower*.

365

See CHARGE OF DEBTS.

LEASEHOLDS.

WILL, *passim*.

DIRECTOR.

See RAILWAY, 3, 4, 5.

DISCLAIMER.

1. The assignees of a bankrupt mortgagor who had no assets disclaimed, and said, that they would have disclaimed before suit, if any application had been made to them. Held, nevertheless, that they were not entitled to costs. *Ford v. White*. 120
2. Rules as to the right of a disclaiming Defendant to costs, in foreclosure suits. *Ford v. Earl of Chesterfield*. 516
3. If a disclaiming Defendant shows

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that he never had and never claimed any interest, or, having an interest, that he had disclaimed or offered to disclaim before the institution of the suit, he is entitled to his costs. But if, having an interest, he neither disclaims nor offers to disclaim till he puts in his disclaimer, he is not entitled. *Ford v. Earl of Chesterfield*.

Page 516

4. These rules prevail, though the Plaintiff never applied to the Defendant to disclaim prior to the institution of the suit. *Ibid*.
5. In a foreclosure suit by second mortgagee, a subsequent judgment creditor, by his answer, disclaimed all interest, and stated, that he had never been applied to by the Plaintiff to disclaim, previously to the filing of the bill; but he did not add, that if he had been so applied to, he would have disclaimed, or that he had never claimed an interest. Held, that he was not entitled to his costs from the Plaintiff. *Ibid*.
6. Where, in consequence of a replication being filed, a disclaiming Defendant is compelled to go into evidence in support of his answer, the Plaintiff must pay his costs, but not otherwise. *Ibid*.

DISCOVERY.

1. The Plaintiff's right to discovery and to production rest on the same principle. *Swinborne v. Nelson*.

416

2. A Defendant who submits to answer must answer fully; he can-

not by denial of the Plaintiff's testimony escape answering. Discovery title-deeds and of professional communications forms an exception. *Swinborne v. Nelson*. Page 416

3. The Plaintiff and Defendant both patents for making gelatin. The Plaintiff instituted his suit for redress against an alleged infringement of his patent, and bill contained searching questions requiring the Defendant to set forth all the articles manufactured by him, the names and addresses of his customers, the prices and the profits, &c. The Defendant denied all infringement. He said he had made his articles according to his own and not according to the Plaintiff's patent, and he declined to give an account of such articles. Held, that, notwithstanding his denial, he was bound to do so. *Ibid*.

4. Dissent from the doctrine laid down in *Adams v. Fisher*, 3 Myl & Craig, 526. *Ibid*.

DISCRETION.

See POWER, 5.

DOCUMENT.

See LAND AGENT.

DUE AND PAYABLE

See GIFT OVER.

DUPLICITY OF CHARGES.

Where a man fills two charges may do an act which

him in one, but not in the other character. *Brown v. Gordon.*

Page 302

ELECTION.

A testator domiciled in *England* and having real and personal estate there, besides Scotch heritable bonds, devised and bequeathed "all his real and personal estate, whatsoever or wheresoever," upon trusts, under which his heir took benefits. The will had no operation on the heritable bonds, which descended to the Scotch heir. Held, by the Master of the Rolls and affirmed by the Lords Justices, that the heir was not bound to elect. *Maxwell v. Maxwell.* 106

EQUITABLE ASSIGNMENT.

1. Where *A.*, having money in the hands of *B.*, directs a payment generally to *C.*, and *B.* consents, *C.* may enforce payment against *B.*; but it is necessary that *A.*'s order should be communicated to *C.* *Morrell v. Wootton.* 197
2. Where *A.*, having money in the hands of *B.*, directs him to pay a sum out of that particular fund to *C.*, this amounts to an equitable assignment, and the assent of *B.* is unnecessary to give it validity. *Ibid.*
3. By an order in a suit, *A.* was ordered to pay a sum to *B.* After *A.* had appealed, *B.*'s bankers induced *B.* to enforce the order and pay the amount to his account, the

bankers undertaking to repay it, if on the appeal, *B.* should be ordered to repay it. The order was reversed, and *B.* directed his bankers to pay the amount to *A.*, but the direction was not communicated to *A.* The bankers had also said, they were quite ready to pay the money to *A.*, and *B.* had said, "there it is for you," viz. at the bankers. *B.* became bankrupt. Held, that neither the agreement, nor the order, nor the statements so made, gave to *B.* any claim upon the fund in the hands of the bankers. *Morrell v. Wootton.* Page 197
See CHOSE IN ACTION.

ERROR AND MISTAKE.

See COVENANT, 2, 3.

ESCHEAT.

1. *A. B.* makes a mortgage in fee, and dies intestate and without heirs. Held, that the equity of redemption does not escheat to the Crown, but belongs to the mortgagee, subject to the debts. *Beale v. Symonds* 406
2. Observations on the case of Viscount *Downe v. Morris*, 3 *Hare*, 394. *Ibid.*
See VENDOR AND PURCHASER, 11.

ESTOPPEL.

See DEED, 2.

MORTGAGE, 3.

EVIDENCE.

1. After a long delay, the Court requires more than the ordinary proof of a debt in the Masters' Office. *Hartnell v. Colvin.* 140

2. In 1817, a trust deed was executed by *A. B.* for the benefit of his creditors. The deed was established by the decree in 1842, and an account of debts was directed. The Petitioner, in 1846, came in under the decree, and claimed in respect of promissory notes dated in 1816, given by *A. B.* to his father, who died in 1828. He produced the notes and proved the signatures, but gave no proof of the consideration, or of any thing being then due. Held, that his claim had been properly rejected by the Master, for after the great lapse of time the notes could not be admitted upon the ordinary proof. *Hartwell v. Colvin.*

Page 140

See EXPERTS.

PEDIGREE, 1, 6.

EXAMINATION *VIVA VOCE*.

Application under the Chancery Improvement Acts (1852) to examine a Defendant *viridvoce* in the Master's Office refused, the decree having directed the examination upon interrogatories. *Routh v. Tomlinson.* 251

EXCEPTIONS.

Exceptions will not lie to a Master's Report for not stating "special circumstances." *Knott v. Collee.* 82
See CONTEMPT.

EXECUTION.

See COSTS, 4.

EXECUTOR.

See BREACH OF TRUST, 2.

COSTS, 3.

INTEREST, 1, 2.

LEGACY.

POWER, 3.

REVOCATION, 2.

EXONERATION.

1. Personalty, being the primary fund for the payment of debts, must be so applied, unless there be an intention expressed, not only to charge the real estate, but also to exonerate the personal estate.

Plenty v. West. Page 173

2. A testator, by a testamentary paper not admitted to probate, but held effectual as regarded his real estate, directed his trustees, to whom he had devised his real estate, in the first place, out of the rents and profits of his said estate, to pay all his just debts, funeral and testamentary expenses, and all costs, &c. Held, that this not only charged the real, but exonerated the personal estate. *Ibid.*

EXPERTS.

The evidence of "experts," as to the age of a document and the character of the handwriting, may, in some cases, be valuable. *Crouch v. Hooper.* 182

EXTRINSIC EVIDENCE.

Erroneous description of a legatee rejected upon extrinsic evidence. *Re Blackman.* 37.

See LEGATEE, 2.

FEME COVERT.

An order obtained *ex parte* by a married woman for leave to file a bill and sue *in forma pauperis*, without a next friend, held irregular, and discharged. *Page v. Page. In re Page.* Page 588

See HUSBAND AND WIFE.

TAXATION, 4, 5.

WILL, 7.

FOREIGN ATTACHMENT.

The Plaintiffs were equitable mortgagees of the shares of *J. H.* in the Woollen Cloth Company, and the *Dhobah* Company were general creditors of *J. H.* Both companies having notice of the Plaintiff's rights, the *Dhobah* Company commenced proceedings in the Lord Mayor's Court, and attached the dividends on the shares in the hands of the Woollen Cloth Company. The same solicitor was employed for both companies, and two persons were directors in both companies. No defence was made, and the *Dhobah* Company obtained payment. Held, first, that the Plaintiffs could not recover them back from either company; but, secondly, that the *Dhobah* Company could not avail themselves of a similar attachment in the Lord Mayor's Court, obtained pending this suit; and, thirdly, that the Plaintiff was entitled to a receiver of the future dividends. *Anderson v. Kemshead.* 329

FORMA PAUPERIS.

See FEME COVERT.

FOUR DAY ORDER.

To obtain a four-day order against a solicitor for the non-delivery of his bill, it must appear that the previous order has been personally served. *Re Wisenold.* Page 357

FRAUD.

See DEED, 3.

MORTGAGE, 3.

FRAUDULENT SETTLEMENT.

See VOLUNTARY SETTLEMENT, 8.

FUNDED PROPERTY.

Bequest of "all the funded property in my name," held to pass Irish Bank stock and Irish $3\frac{1}{4}$ per cents. belonging to the testator and standing in his name jointly with three others. *Mangin v. Mangin.* 300

GENERAL ORDER

(87, May, 1845).

Service on the Defendant of an order limiting the time within which he might apply to set aside a decree *pro confesso*, held a sufficient notice, under the 87th Order of May, 1845; and no application being made by him, the decree was thereupon made absolute. *Trilley v. Keefe.* 83

See ABSCONDING DEFENDANT, 1.

GIFT OVER.

Real and personal estate were given upon trust during the life of *A.*, out of the income to pay *A.* 200*l.*

a year, and one-third of the residue to *B.*; and on the death of *A.*, to sell and pay one-third to *B.*; then a gift over, on the death of *B.*, before his share should "become due and payable." *B.* died in the life of *A.* Held, that the gift over took effect. *Creswick v. Gaskell.* Page 577

HEIR.

Bequest to *A.* for life, and, after her decease, to *B.* or *his heirs*, in such manner as he might deem proper. *B.* died, without appointing, before *A.* Held, a gift, by substitution, to the next of kin of *B.*, at his and not at *A.*'s death, according to the Statute of Distributions, as tenants in common and in the proportion fixed by the Statute. *Jacobs v. Jacobs.* 557

HOTCHPOT.

See POWER, 1.

HUSBAND AND WIFE.

1. A husband may make a valid assignment of his wife's reversionary interests in leaseholds, but *secus*, if the interest be of such a nature that it cannot by possibility vest in the wife in possession during the coverture. *Duberley v. Day.* 33
2. A wife's leaseholds were, on her marriage, limited to her absolutely in the event of her surviving her husband, but without any trust for her separate use. Held, that the

husband could not, during the coverture, dispose of this contingent reversionary interest of his wife in the term. *Duberley v. Day.* Page 33

3. The whole of a fund to which the husband in right of his wife had become entitled, settled, as against his assignee, on the wife and children, the husband being in reduced and insolvent circumstances. *Marshall v. Fowler.* 249

4. A wife may, in many respects, enter into a contract for valuable consideration with her husband; so, conversely, a husband may become a purchaser from his wife of property belonging to her. *Hewison v. Negus.* 594

See INFANT.

SEPARATION DEED.

SETTLEMENT.

VOLUNTARY SETTLEMENT, 8.

ILLEGALITY.

The Court looks with great disfavour on an objection of illegality of a contract, urged by a party to avoid its performance after he has received the consideration for it. *Shrewsbury and Birmingham Railway Company v. London and North-Western Railway Company.* 441

INCOME.

1. A testator gave the interest of his residue to *W.* and his wife, with remainder to the testator's grand-

children. *W.* died twenty-nine years after the testator, and his wife applied for the income. The Court, being unable to decide on her right in consequence of the absence of some parties, allowed her in the meanwhile to receive a portion of the income, on her undertaking to refund if necessary. *Moffat v. Burnie.* Page 298

2. An allowance of income *pendente lite*, under the 15 & 16 *Vict.* c. 86, s. 57, will only be made upon the admission by the executors of assets. *Knight v. Knight.* 358

INFANT.

Effect of an agreement, on the marriage of a female infant, to settle her real estate. It would be a fraud upon the husband's contract, if he were to consent to a disposition of the estate by his wife, calculated to defeat the settlement. *Ex parte Blake, In re London Dock Company.* 463

INJUNCTION.

1. A *puisné* incumbrancer offered to pay off the first mortgagee, which, being declined, he filed a bill to compel a transfer. The first mortgagee having afterwards proceeded to sell the property, was restrained from transferring the first mortgage and parting with the legal estate and title deeds. *Rhodes v. Buckland.* 212
2. A Plaintiff applying for an injunction should fairly state his case, both where the application is

ex parte, and where on notice the opponent does not appear; but the Court does not hold him so strictly in the latter case as in the former.

Maclaren v. Stainton. Page 279

3. On an application for an *ex parte* injunction, a Plaintiff omitted to state a material fact. A motion being made to dissolve it, the Plaintiff swore that he had forgotten the circumstance. Held, that it was no excuse for the suppression. *Clifton v. Robinson.* 355
4. The practice as to common injunctions is not, in all respects, assimilated to that in cases of special injunctions. *Senior v. Pritchard.* 473

5. A *prima facie* case, supported by affidavit, is now required to entitle a Plaintiff to the common injunction; and although that case be met by the affidavit of the Defendant, denying the equity of the bill, still the Plaintiff is entitled to an injunction to stay proceedings at law until answer, in order to secure him the benefit of a full discovery, in aid of his defence at law. *Ibid.*

See ACQUIESCENCE.

ADMINISTRATION.

DEED, 2.

SEPARATION DEED, 2.

INJUNCTION (COMMON).

Where the common injunction had been obtained prior to the Act 15 & 16 *Vict.* c. 86, and the answer came in: Held, that the proper

practice was to give notice of motion to dissolve. *Langford v. May.* Page 32

INSOLVENT ACT.

- A. B.* took the benefit of the act (the 1 & 2 *Vict.* c. 110), but no judgment was entered up under the 87th section. Held, on his death, that a scheduled creditor had no remedy against his assets. *In re Moylan.* 220

INTEREST.

1. Rule as to charging executors and trustees with interest on balances, and at what rate and whether with annual rests. *Knott v. Cottee.* 77
2. An executor and trustee who was directed to invest in government stocks of *Great Britain*, or upon real security, and accumulate the surplus, after maintaining infants, invested the estate in the foreign funds. It was held that the investment was improper, and he was charged with four per cent. with annual rests. *Ibid.*
3. Payment of interest on a debt by surviving partners, one of whom was the executor of a deceased partner, held to have no reference to the executorial character. *Brown v. Gordon* 302
See CREDITORS' DEED.
THELLUSSON ACT, 1.

IRREGULARITY.

See PLEA.

JOINTURE.

See DEED, 1.

JUDGMENT.

See INSOLVENT ACT.

REDEMPTION.

SET-OFF.

JURISDICTION.

See ADMINISTRATION, 1.

LANDS CLAUSES CONSOLIDATION ACT.

MISREPRESENTATION, 3.

VENDOR AND PURCHASER, 10.

LACHES.

A creditor of a banking firm held to have accepted the surviving partners as his debtors, and to have lost, by sixteen years delay and his conduct, the benefit of a trust contained in the will of the deceased partner for payment of his debts out of his real estate. *Brown v. Gordon.* Page 302
See PARTNERSHIP.

LAND AGENT.

A decree made with costs against a land agent and receiver after his discharge, for the delivery up of all documents relating to the estate and its management. *Lady Beresford v. Driver.* 134

LANDLORD AND TENANT.

See LEASE, 1.

LANDS CLAUSES CONSOLIDATION ACT.

A bill by a company against an in-

dividual claiming to be injuriously affected under the 68th section of the Lands Clauses Act was dismissed, with liberty to the Defendant to apply for the costs, if he should establish his right to compensation. The parties proceeded by arbitration, but neither took up the award. Upon motion by the Defendant that the company might pay the costs or be compelled to take up the award: Held, as to the first, that the Defendant was premature, no award having been made; and, as to the second, that the Court had no jurisdiction. *Sutton Harbour Company v. Hitchens.* Page 381

LEASE.

1. *A.* granted *B.* a lease containing a covenant against assignment. *A.* afterwards agreed to cancel the lease, and to grant *B.* a much more beneficial one, "as a reward for the great improvement he had made in the estate, and as an encouragement for his general industry." *A.* died before executing the second lease, and *B.* filed a bill for specific performance against his representatives. A compromise was effected for granting a lease for a reduced term, "the lease to contain all covenants usual and ordinary in farming leases." It was insisted by the tenant, that under the compromise, there should be no restriction against assignment; but held, that the Master, in settling the lease, was to have regard to the original

lease and to the custom as to farming leases, if any. *Bell v. Barchard.* Page 8

2. An act authorized the *Shropshire Union* to lease several lines to the *North-Western*. The *Shrewsbury* entered into a contract with the *North-Western* to operate "during any such lease authorized to be granted by the said act." The *Master of the Rolls* held that the contract had no operation until all the lines had been finished; but *L. J. Turner* differed in opinion. *Shrewsbury and Birmingham Railway Company v. London and North-Western Railway Company.* 441 See CHARITY, 2, 3, 4. PARTITION, 1.

LEASEHOLDS.

- A testator having devised the residue of his personal estate, whatsoever and wheresoever, to *A. B.*, devised all his manors, lands, &c. at *W.*, in the county of *Durham*, and at *B.*, in the county of *York*, and a parcel of land purchased of *M. L.*, and all other his real estates in the counties of *Durham* and *York* and elsewhere, and all his estate and interest therein, to *C.* and *D.* and their heirs, to certain uses. Held, under the 1 *Vict.* c. 26, s. 26, that his leaseholds in *Durham* passed to *C.* and *D.* with the real, and not to *A. B.* with the personal estate. *Wilson v. Eden.* 153

LEGACY.

- A bequest of an annuity to an executor for his trouble in the con-

duct and management of the testator's affairs, has no priority over other legacies, in case of a deficiency, and it must abate. *Duncan v. Watts.* Page 204

See WILL, *passim*.

LEGATEE.

1. Bequest in 1829 of 40*l.* a-year to each of the seven children now living of J. S. Y. He had nine children then living. Held, that they all took. *Yeats v. Yeats.* 170
2. A., the grandchild of C., and B., the widow of a child of C., held, under the circumstances, entitled to a bequest made to A. and B., widow, described as "children of C." *Re Blackman.* 377

See EXTRINSIC EVIDENCE.

WILL, 6.

LESSOR AND LESSEE.

See COVENANT, 2, 3.

LEASE.

LIEN.

1. The consideration, as stated in a conveyance, was 150*l.* paid and an acceptance for 300*l.* Held, that the form of the deed was not conclusive, and that it was competent for the vendor to show, that he had stipulated for a lien for the amount of the acceptance. *Frail v. Ellis.* 350
2. A. conveyed an estate to B., and, according to the conveyance, an acceptance was given "in full satisfaction for the absolute purchase," but in reality, it was agreed, that the vendor should have a mortgage for the money. Before the acceptance became due, B.

mortgaged to C., who employed the same solicitor as had been engaged in the purchase, and C. had notice that the bill had not been paid and of the form of the conveyance. Held, first, that C. was affected by the notice in his solicitor; and, secondly, that under the circumstances, he was bound to inquire into the true nature of the transaction between A. and B., and consequently that his security ought to be postponed to A.'s. *Frail v. Ellis.* Page 350

LIS PENDENS.

See PARTIES, 5.

TRUSTEE, 2.

LOAN.

See USURY.

LORD MAYOR'S COURT.

See FOREIGN ATTACHMENT.

LUNACY.

See VENDOR AND PURCHASER, 10.

MARRIAGE SETTLEMENT.

A covenant in a marriage settlement, that in case, at any time "thereafter" during the coverture, any real or personal estate should "descend, come to or vest in" the wife (who was then an infant) should be settled, held to include the proceeds of real estate taken by a public company, to which the wife, at the execution of the settlement, was entitled in remainder.

Ex parte Blake, In re The London Dock Company. Page 463

MASTER OF HOSPITAL.
See APPORTIONMENT.

MASTER'S OFFICE.
See EXAMINATION VIVA VOCE.

MINE.
See COVENANT, 2, 3.
PARTITION, 1.

MINING COMPANY.
See PARTNERSHIP.

MISREPRESENTATION.

1. Distinction between misrepresentations giving a legal and those giving an equitable remedy. *Whitmore v. Mackeson.* 126
2. The Court (assuming that the Plaintiffs had lent *A. B.* money, on the security, first, of a leasehold, secondly, of a policy, and thirdly, of the written representation of his solicitor as to his solvency), held, that the Plaintiffs could not make the solicitor liable for misrepresentation, without showing that they had taken proper steps to make the other securities available. *Ibid.*
3. The Plaintiffs lent *A. B.* money on mortgage on the application of his solicitor, who assured them, in writing, that in his opinion he would be able to pay the amount. The Plaintiffs, alleging this to be a false and fraudulent misrepresentation, instituted a suit in equity to make the solicitor personally liable. Held, that their remedy, if any,

was at law. *Whitmore v. Mackeson.* Page 126
See MORTGAGE, 3.

MISTAKE.
See DEED, 3.

MONOPOLY.
See RAILWAY, 1.

MORTGAGE.

1. Right of *eigné* as against a *puisé* mortgagee to enforce all his remedies at the same time. *Cockell v. Bacon.* 158
2. *A.*, being tenant for life of an estate, and the owner of a charge of 20,000*l.* thereon, mortgaged the 20,000*l.* to *B.* for 14,000*l.* He afterwards mortgaged it and other property to *C.* for 24,000*l.* *A.* died, and the succeeding tenant for life prayed a redemption against *C.* on payment of such a sum as was due on account of the 6,000*l.* (thus splitting the charge of 20,000*l.* into two portions). Held, that both *B.* and the executors of *A.* were necessary parties to such a suit. *Lord Kensington v. Bouverie.* 194
3. *A.* executed a mortgage to *B.* for 1,000*l.* This was not acted on, but *A.* afterwards executed another mortgage for 2,000*l.* to *B.* The solicitor employed retained the first deed, and afterwards fraudulently induced *B.*, without consideration, to sign a memorandum, undertaking to transfer the first mortgage to *C.*, and he executed such transfer. *C.* on the faith of *B.*'s acts, advanced 1,000*l.*, which was received by the solicitor and misapplied. Held, that

B. must be postponed to *C. Hiorns v. Holtom.* Page 259

4. Principles on which the Court acts in directing a sale of a mortgaged estate, under the late act. *Hurst v. Hurst.* 372

5. A trust for sale of real estate held not to authorize a mortgage. Page *v. Cooper.* 396

6. Real estate was conveyed to trustees upon trust to "sell and dispose" thereof, and out of the money to arise, "levy, raise and pay, two sums of 150*l.* and 1,000*l.*, and invest the residue of the monies to arise for the husband and wife for their lives, and afterwards for their children, and, in default, as the wife should appoint by will. Held, that the trustees were not justified in raising these two sums by mortgage, inasmuch as a conversion of the estate into money out and out was intended. *Ibid.*

See DISCLAIMER, 2, 3, 4, 5.

INJUNCTION, 1.

MORTGAGOR AND MORTGAGEE.

POWER, 4.

REDEMPTION.

MORTGAGOR AND MORTGAGEE.

Where a mortgagor makes an unconditional tender to the mortgagee of a sum, and the mortgagee refuses to accept it, he does so at his own peril; and if the amount tendered was all that was due, the mortgagee must bear the costs of a subsequent suit for redemption. *Harmer v. Priestley.* 569
See MORTGAGE.

MORTMAIN.

Gift of stock "for the establishment of a charity school," held void. *Re Clancy.* Page 295

MOTION.

See SECURITY FOR COSTS, 3.

NEW TRUSTEE.

See TRUSTEE, 1.

NEXT FRIEND.

See FEME COVERT.

HEIR.

SECURITY FOR COSTS, 2.

NEXT OF KIN.

A testator bequeathed the residue to his wife for life, with remainder to his children living at his death, and if there should be none (which happened), then he directed, that immediately after his wife's decease, it should "become the property of the person who should *then* become entitled to take out administration to his effects, as his personal representative," according to the Statute of Distribution, and in the proportions thereby pointed out, in case he had died intestate and unmarried. Held, that the next of kin at the death of the testator, and not those at the death of the tenant for life, were entitled. *Cable v. Cable.* 507

See HEIR.

NOTICE.

1. A party taking an equitable mortgage with notice of prior equitable mortgage, cannot, by assignment to another without notice, give him a better title. *Ford v. White.*

Page 120

2. Property in *Middlesex* was mortgaged to *A.*, and afterwards to *B.*, and subsequently to *C.*, with notice of *B.*'s incumbrance. *C.* registered before *B.* and afterwards assigned to *D.*, who had no notice of *B.*'s mortgage. Held, that the interests being equitable, *D.* had no priority over *B.* *Ibid.*

See FOREIGN ATTACHMENT.

GENERAL ORDER.

LIEN.

VENDOR AND PURCHASER, 10.

NOTICE OF MOTION.

Service of a notice of motion on a *Scotch* company, not party to the suit, at its office in *London*, held good. *Maclaren v. Stainton.* 279

OPENING BIDDINGS.

1. When biddings are opened, the purchaser is entitled to interest on his deposit at four per cent. *Banks v. Banks.* 380
2. A party opening biddings must deposit the amount of his advance, but he is not required, in the first instance, to pay into Court the amount of the original deposit. Upon his neglect to make the required payment, the order to open biddings will be discharged with costs, to be paid by him. *Ibid.*

ORDER OF COURSE.

See FEME COVERT.

TAXATION, 3.

PARISH.

An information in respect of parish land was filed against churchwardens *nominatim*, and not in the mode pointed out by the 59 *Geo. 3*, c. 12, s. 17. Before the hearing they were changed. Held, that the Court was not prevented making a decree. *Attorney-General v. Sal-keld.* Page 554

PARTIES.

1. In a suit for administration against the administrator, with the will annexed, and the widow, to whom the assets had been assigned, such administrator was alleged and proved to be out of the jurisdiction. Held, that the suit could not proceed in the absence of a legal personal representative. *Donald v. Bather.* 26
2. Since the 15 & 16 *Vict.* c. 86, the trustees of a mortgage represent the *cestuis que trust* sufficiently to protect the mortgagor, but where the surviving trustees or the representatives of the trustees alone are parties, the Court requires the *cestuis que trust* to be also represented, in order to secure the due application of the trust property. *Stansfield v. Hobson.* 189
3. The person who would be appointed administrator *ad litem*, is the most proper person to be nominated under the 15 & 16 *Vict.* c. 86, s. 44, to represent a deceased party who has no personal representatives. *Dean of Ely v. Gayford.* 561
4. This enactment extends even to

those cases where the party "interested" is sought to be made liable. *Dean of Ely v. Gayford*.

Page 561

5. Incumbrancer *pendente lite* held not an indispensable party to a suit to recover the fund. *Macleod v. Annesley*. 600

See MORTGAGE, 2.
PARISH.

PARTITION.

1. One of two tenants in common of an estate agreed to grant a lease of the mines under it. Held, that the lessee was entitled to a decree for specific performance and for a partition of the estate. *Heaton v. Dearden*. 147
2. A power to trustees "to sell and dispose of" the testator's real estate and to give receipts, does not authorize a partition. *Brassey v. Chalmers*. 223

PARTNERSHIP.

In 1819, a person entitled to a share in a coal mining company became bankrupt. Dividends were declared in 1831, 1838, and subsequently. The bankrupt's shares were carried over to a separate account in the company's books down to 1850, but no claim was made by the assignees until that year. Held, that the right of the assignees to these dividends still subsisted, but that they were not entitled to any profits made by their retainer. *Penny v. Pickwick*.

246

See DEBTOR AND CREDITOR.

PAYMENT INTO COURT.

Two trustees, having power to alter and vary a trust fund, sold it out for that purpose, but allowed the produce to be received by one alone. Held, that the other, who failed to show that the fund was properly invested, was bound to pay the amount into Court. *Wiglesworth v. Wiglesworth*. Page 269

PEDIGREE.

1. Observations on the little reliance to be placed on the evidence of persons who strive to work out and sustain a particular pedigree. *Crouch v. Hooper*. 182
2. In pedigree cases, if one link be assumed, any two persons may be proved to be related; and, therefore, in such cases, the difficulty usually consists in properly weighing and considering the evidence relating to the connecting link. *Ibid*.
3. In pedigree cases, it is a rule of evidence, that the declarations of deceased members of the family, *post litem motam*, are inadmissible; and anterior declarations are little to be regarded, unless corroborated by other circumstances. *Ibid*.
4. Where witnesses are once impressed with the belief of their relationship to a given individual, they are apt in time, by talking and discussing the matter, to bring themselves over to a conscientious belief of family conversations and declarations tending to support that relationship, but which never took place. *Ibid*.

5. Evidence of conversations with deceased persons is not given under the ordinary worldly sanction, from the difficulty, in such a case, in convicting the witness of perjury. *Crouch v. Hooper*.

Page 182

6. The absence, unexplained, of the baptismal certificate of the party forming the material link of a pedigree, while those of the other sons are carefully and regularly entered, forms a difficulty almost insuperable in substantiating the alleged pedigree. *Ibid*.

See EXPERTS.

PENDENCY OF SUIT.

See FOREIGN ATTACHMENT.

PARTIES, 5.

TRUSTEE, 2.

PER CAPITA.

Bequest to be equally divided between *A.* and wife and *B.* and wife for their lives, after which, to be equally divided between their children, (*i. e.*) the children of *A.* and *B.* Held, that their children took *per capita*, and that on the death of *A.* and his wife, a moiety became divisible, equally, amongst the children of *A.* and *B.* *Abrey v. Newman*. 431

See SUBSTITUTION.

PERSONAL REPRESENTATIVES.

See PARTIES, 3, 4.

PER STIRPES.

See PER CAPITA.

SUBSTITUTION, 2.

PETITION.

See COSTS, 4.

PLEA.

A Defendant took out a warrant for six weeks' "further time to answer." The Plaintiff's solicitors indorsed it, "we consent to fourteen days." The order, as drawn up, gave the time "to plead, answer, or demur, not demurring alone." The Defendant having put in a plea of the Plaintiff's insolvency, it was ordered to be taken off the file with costs, and the order was varied so as to limit it to time to answer only. *Newman v. White* Page 4

PLEADING.

See BANKRUPT.

PARISH.

PARTIES, 1, 5.

SUPPLEMENT.

POSSESSOR OF ESTATE.

See TENANT FOR LIFE.

POWER.

1. A testator gave a fund to four persons or any of them, in such shares, &c., as *A. B.* should appoint, and in default equally. He directed that such four persons should bring into hotchpot the amount of advances he might make to any of them in his life. Held, that the hotchpot clause operated only on the unappointed fund, if any. *Brocklehurst v. Flint* 100
2. A power to trustees "to sell and dispose of" the testator's real es-

- tate and to give receipts, does not authorize a partition. *Brassey v. Chalmers* Page 223
3. Where a naked power is given to several, it cannot be exercised by the survivors; but if a power be annexed to an office, any persons filling the office may execute it. Power "to my executors herein-after mentioned, with the approbation of my trustees for the time being," to sell real estate, held by the *Master of the Rolls*, upon the context, not to authorize a sale by the survivor of the executors, but the Lords Justices dissented from this decision. *Ibid.* 231
4. A tenant for life, having a power to charge the estate with portions for younger children, mortgaged his life estate, and covenanted not to exercise the power. Held, that he could not, afterwards, charge the estate with portions, to the prejudice of his mortgagees. *Hurst v. Hurst* 372
5. Under a marriage settlement, trustees were, after the bankruptcy of the husband and the death of the wife, to pay the income "in such manner, for the maintenance and support or otherwise for the benefit of the husband and the issue," as they might think proper. Held, that the discretionary power of the trustees, as to the application of the income, was not taken away by the bankruptcy, so as to entitle the objects to take equally. An inquiry was directed as to what had been properly applied for the maintenance of the issue, and the assignees were declared entitled to the surplus. *Wallace v. Anderson* Page 533
6. Held, by the *Master of the Rolls*, governed by the case of *Buckell v. Blenkhorn* (5 *Hare*, 131), that a will, not sealed but executed according to the formalities of the last Wills Act, was a due execution of a power required to be executed by writing, under hand and seal. But, held by the L. Js. that the title was too doubtful to force on a purchaser. *Collard v. Sampson* 543
7. A power to invest trust monies on real security in *Ireland* authorizes a loan on leaseholds for lives, perpetually renewable at a head rent. *Macleod v. Annesley* 600
8. The general understanding is, that a trustee should only lend to the extent of two thirds of the value on agricultural freeholds, and to the extent of half on freehold houses. *Semble*, also, that half is the limit in the case of a leasehold renewable for ever at a large head rent. *Ibid.*
9. Trustee made liable for a loss on a mortgage investment, he not having taken due precautions to ascertain the value of the property mortgaged. *Ibid.*
- See ABSOLUTE INTEREST, 1.
BREACH OF TRUST, 1.
RAILWAY, 1.
WILL, 7.
- POWER OF ATTORNEY.
See PRACTICE.
- POWER OF SALE.
See DEED, 2.
MORTGAGE, 1.

PRACTICE.

Whether it is necessary in demanding payment by attorney to leave a copy of the power of attorney, *semble* not. *Re Dufaur and Blake-ney* Page 113

See ABATEMENT.

ABSCONDING DEFENDANT.

CHOSE IN ACTION.

CONTEMPT.

COSTS, 2.

DISCLAIMER.

EXAMINATION *Vind Voce*.

EXCEPTIONS.

FEME COVERT.

GENERAL ORDER.

INCOME.

INJUNCTION, 2, 3, 4, 5.

LIEN.

NOTICE OF MOTION.

OPENING BIDDINGS.

PAYMENT INTO COURT.

PLEA.

SALE.

SECURITY FOR COSTS.

SUPPLEMENT.

TRUSTEE, 1.

PRE-EMPTION.

1. A right of pre-emption held limited to the life of the owner of the property. *Stocker v. Dean* 161
2. *Semble*, that a right of pre-emption "at all times thereafter," cannot be enforced after the death of the owner of the property. *Ibid*.

PRIORITY.

See CHOSE IN ACTION.

LEGACY.

LIEN.

MORTGAGE, 3.

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PRODUCTION.

See DISCOVERY.

PROOF.

See DEBT.

EVIDENCE.

PUBLIC COMPANY.

See CONTRIBUTORY.

MINING COMPANY.

PARTNERSHIP.

RAILWAY.

PUBLIC POLICY.

See RAILWAY, 1.

RAILWAY.

1. During a contest before Parliament, two competing railway companies came to an agreement for dividing the profits earned by both in a given proportion, and for regulating the traffic. Lord *Cottentham* and the Q. B. held that the arrangement was not invalid, as a fraud upon the public by creating a monopoly, and the *Master of the Rolls* considered that Lord *Cottentham* had decided inferentially, that such a contract was not *ultra vires*. But, held by L. J. *Knight Bruce*, that it was a breach of trust, and by L. J. *Turner*, that it was *ultra vires*, and contrary to public policy. *Shrewsbury, &c., Railway Company v. London, &c., North-Western Railway Company*. Page 441
2. A railway company cannot, in the absence of any authority contained in their acts of incorporation, become proprietors of steam boats and carriers of passengers and goods by sea. *Ibid*.

X X

3. A general meeting of a railway company placed 12,050 shares in a projected extension line at the disposal of the directors. Held, that the disposal was merely as trustees for the company, and not for their own benefit; and *Hudson*, who was the chairman (and exercised uncontrolled authority in the conduct of the concerns of the company), having sold a considerable part of such shares at a premium, was held liable to account to the company for their produce, with interest at 5l. per cent. Held, also, that he could not retain the profits, either as a large landowner on the line, or as a remuneration for his great services, or on the ground of the acquiescence of the shareholders, to be inferred from a presumed knowledge of the share-book. *York and North Midland Railway Company v. Hudson*. Page 485
4. The chairman of a railway company allotted a number of the unappropriated shares to his nominees; they were sold at a premium, and the produce received by him. Held, that as trustee, he was bound to the company for the profit made. *Ibid*.
5. The chairman of a railway company appropriated various unallotted shares to the use of various persons, whose names he did not mention, in order to secure or reward services which he declined to state, but which it was insinuated was in the nature of "secret service money." Held, that if the

Defendant had applied the property of the company in a manner which would not bear the light, he must suffer the consequences; and that being charged with the receipt of the money, he could not discharge himself by the suggestion of such an application. *York and North Midland Railway Company v. Hudson*. Page 485

6. As to the power of a majority of shareholders at a public meeting to dispose of the funds of a company so as to bind absent shareholders, or even a minority. *Ibid*. 495
 7. When shares are left at the disposal of directors, they cannot, directly or indirectly, derive any personal advantage from their disposal. *Ibid*. 496
- See LEASE, 2.

REAL AND PERSONAL ESTATE.

See EXONERATION.

REDEMPTION.

Judgment creditors are not allowed successive periods of three months for redemption. *Bates v. Hillcoat*. 139

See MORTGAGE, 2.

RELATOR.

See ATTORNEY-GENERAL.

RELEASE.

See CREDITORS' DEED.

REMOTENESS.

1. Bequest to A. for life, with remainder to such of his children as

should live to attain twenty-five, equally, with an imperative direction, that the interest thereof, while any person presumptively entitled should be under twenty-five, should be applied for his maintenance, and a discretionary power of advancement. Held void for remoteness. *Southern v. Wollaston*. Page 166

2. The marginal note of *The Marquis of Bute v. Harman*, 9 Beav. 320, is incorrect, the bequest having been held void for remoteness. *Ibid*.

3. A gift of a legacy to *A.* for life, and afterwards to pay and divide it amongst all his children who shall attain the age of twenty-five, is not too remote, if, by the death of *A.* at such a time before the testator, all the children must necessarily attain twenty-five within twenty-one years after the testator's death. *Ibid*. 276

4. The doctrine laid down in *Leake v. Robinson* as to remoteness applies to real as well as to personal estate. *Walker v. Mower*. 365

5. A testatrix appointed a trust fund to two trustees, in trust to pay the dividends to *A.* for life, and after his decease, she gave the dividends to two others, *B.* and *C.*, for life; and after the decease of the survivor, she gave, bequeathed, willed and directed the principal to be divided into two parts, and one of them to be "transferred or paid" to the children of those two persons respectively at the age of

twenty-five years. Held, that the gift to the children was void for remoteness. *Chance v. Chance*.

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REPLICATION.

See DISCLAIMER, 2, 3, 4, 5.

RESCINDING CONTRACT.

See VENDOR AND PURCHASER, 12.

REVERSIONARY INTEREST.

See HUSBAND AND WIFE, 1, 2.

REVIVOR.

See ABATEMENT.

BANKRUPT.

SUPPLEMENT.

REVOCATION.

1. A testamentary paper relating to real estate alone, commencing, "This is the last will and testament of me relating to all my real estate whatsoever." Held totally to revoke a prior will. *Plenty v. West*. 173

2. A testator appointed his wife sole executrix, and he made her and *A.* trustees. By a codicil he revoked the appointment of his wife as executrix, on the ground that "the duties were too arduous for a lady," and he appointed *A.*, *B.* and *C.* "executors in trust of his will." By another codicil, he referred to his having revoked the executorship, and to having appointed *A.*, *B.* and *C.* executors. Held, that the revocation was con-

fined to the office of executrix only. *Graham v. Graham*.

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ROMILLY'S (SIR SAMUEL)
ACT.

See CHARITY, 1, 5, 6.

SALE.

The 55th section of the statute 15 & 16 *Vict.* c. 86, is applicable only to cases in which, for the protection of property or other like cause, it is necessary to apply to the Court for a sale, and it was not intended to enable parties, in a contested suit, to obtain, upon an interlocutory application before the hearing, a decision upon the questions in contest. *Prince v. Cooper*. 546

See CHARITY, 1.

MORTGAGE, 5, 6.

SCHOOL.

An academy for the education of English Presbyterians was established at *Warrington*, and was governed by a body of trustees, who afterwards deemed it expedient to remove it to *Manchester*, thence to *York*, and back again to *Manchester*. There was no trust deed or document declaring the original objects of the charity, but it was stated in a resolution of the trustees to be for the benefit of that part of the kingdom which was totally deficient in academies. The trustees having presented a

petition asking to have the academy removed to *London*, held that the trustees had power so to remove it: that the object of the charity was to afford education to students for the ministry and others: and that its locality was a secondary consideration, and looked upon only as a means to an end. *In re Manchester New College*.

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See MORTMAIN.

SCOTCH CORPORATION.

See ADMINISTRATION, 1.

NOTICE OF MOTION.

SECURITY FOR COSTS.

1. A Plaintiff went abroad, pending a suit, under circumstances of suspicion. Upon his failing to show that his residence there was temporary, he was ordered to give security for costs. *Blakeney v. Dufaur*. 292
2. *A. B.* was ordered to be substituted for *C. D.* (made a Defendant) as the next friend of the Plaintiff, and *C. D.* was ordered to give security for costs up to that time. Held, that the proper security was the bond of *C. D.* and of a responsible surety. *Payne v. Little*. 563
3. An objection as to the nature and amount of the security for costs required by the Master, held to be properly taken by motion and not by exception. *Ibid.*

SEPARATE ESTATE.

See DEBTOR AND CREDITOR.

HUSBAND AND WIFE.

SEPARATION DEED.

1. Courts of Equity, recognizing the validity of separation deeds, will enforce them. *Sanders v. Rodway*.

Page 207

2. By a separation deed, a husband covenanted with his wife's father, that his wife, during her life, might live separate from him, that he would not sue her in the Ecclesiastical Court for living separate; that he would not molest, &c. her, nor claim any of her property; and her father covenanted with the husband to maintain her and indemnify him. Upon an infraction of the covenant, by the husband molesting his wife, he was restrained by injunction. *Ibid*.

SERVICE (PERSONAL).

See FOUR-DAY ORDER.

SET-OFF.

Equitable right of set-off enforced after a judgment at law. *Smith v. Parkes*. 115

SETTING ASIDE.

See DEED, 3.

SETTLEMENT.

A *feme sole*, in contemplation of a marriage with T., vested personal property in trustees, upon trust for the sole benefit of herself, her executors, &c., until her marriage (if any), with subsequent trusts for her issue. She never married T., but before her marriage with M. the trustees handed over to her a part of the fund. Held, that the settlement was irre-

vocable; that she had no power of absolute disposition until marriage; that the trusts were to arise on any marriage; and that the trustees had committed a breach of trust for which they were answerable. *M'Donnell v. Hesilrige*.

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See DEED, 3.

HUSBAND AND WIFE, 2.

VOLUNTARY SETTLEMENT.

SHAREHOLDERS.

See CONTRIBUTORY.

RAILWAY, 6.

SHARES.

See BANKING COMPANY.

SLEIR (SCOTCH).

See ELECTION.

SOLICITOR.

A solicitor having changed his name, a corresponding variation was ordered to be made on the roll of solicitors. *Re Matthews*. 245

See FOUR-DAY ORDER.

TAXATION, 6, 7.

SOLICITOR AND CLIENT.

A country solicitor who is authorized to institute a suit, is justified in employing a London agent for that purpose, in whose name, as agent, the bill may be filed. *Solley v. Wood*. 370

See COSTS, 2.

TAXATION, 1, 2, 3, 4, 5, 8.

SPECIFIC LEGACY.

See DEMONSTRATIVE LEGACY.

SPECIFIC PERFORMANCE.

See LEASE, 1.

PARTITION, 1.

VENDOR AND PURCHASER, 1, 2,
3, 4, 5, 6.

STATUTE.

27 *Eliz.* c. 4.

See VOLUNTARY SETTLEMENT, 8.

52 *Geo.* 3, c. 101.

See CHARITY, 1, 5, 6.

59 *Geo.* 3, c. 12, s. 17.

See PARISH.

3 & 4 *Will.* 4, c. 27, s. 28.

See STATUTE OF LIMITATIONS.

1 *Vict.* c. 26.

See LEASEHOLDS.

POWER, 6.

WILL, 5.

1 & 2 *Vict.* c. 110.

See INSOLVENT ACT.

6 & 7 *Vict.* c. 73.

See TAXATION, 4, 6, 8.

8 & 9 *Vict.* c. 18.

See LANDS CLAUSES CONSOLIDATION
ACT.

10 & 11 *Vict.* c. 96.

See TRUSTEE RELIEF ACT.

15 & 16 *Vict.* c. 86.

See APPEARANCE.

INCOME, 2.

INJUNCTION, 4, 5.

INJUNCTION (common).

PARTIES, 3, 4.

CHILDREN, 2.

STATUTE OF DISTRIBUTIONS.

See HEIR.

STATUTE OF LIMITATIONS.

A mortgagee, after being in possession more than twenty years without

account or acknowledgment, wrote to the plaintiff's solicitor, — "I have received yours of the 2nd instant; I do not see the use of meeting either here or at *M.*, unless some one is ready with the money to pay me off." Held, that this was a sufficient acknowledgment to take the case out of the statute 3 & 4 *Will.* 4, c. 27, s. 28. *Stansfield v. Hobson.* Page 236

STOCK.

See USURY.

SUBSTITUTED SERVICE.

A Defendant, resident out of the jurisdiction, had given a general power of attorney to a solicitor to act for him. The Court ordered substituted service on the solicitor of an order to revive, and thereupon gave the Plaintiff leave to enter an appearance, and made a general order that service of all proceedings on the solicitor should be good service. *Forster v. Menzies.* 568

SUBSTITUTION.

1. Bequest (in effect) to *A.* for life, and in default of her appointment, equally amongst "her sisters, or their children, living at her decease." Held, first, that the children took by substitution, and therefore, that the children of a sister who was dead at the date of the will could not take; and, secondly, that such of the children as were entitled took "*per stirpes.*" *Congreve v. Palmer.* 435

2. Distinction between a gift to several, with remainder to their children, and one to several, with a substitutionary gift to their children, in respect to the children taking "*per stirpes*" or "*per capita*." *Ibid.* *Congreve v. Palmer.*

Page 435

See HEIR.

SUBSTITUTIONAL GIFT.

1. Distinction between a substitutional gift after a bequest to persons as a class, and one following a gift to individuals *nominatim*. *Ive v. King.* 46
2. Bequest to *A.* for life, with remainder to *B.*, *C.* and *D.*, with a substitutional gift of their "respective shares," in case of the death of any of them. Held, that *B.*, *C.* and *D.* took as tenants in common. *Ibid.*

SUPPLEMENT.

On the death of an official assignee (a Defendant), a supplemental order, substituting his successor, must be obtained as of course, and on a simple allegation unsupported by affidavit. *Gordon v. Jesson.* 440

See ABATEMENT.

APPEARANCE.

BANKRUPT.

SUPPRESSION.

See INJUNCTION, 2, 3.

SURVIVORSHIP.

1. Bequest to *A.* for life, and, "at her decease, to her surviving children," when they have attained

twenty-one. Held, that the survivorship had reference to the death of *A.*, and that those children only who survived her were entitled. *Huffam v. Hubbard.* 579

2. The case of *Cripps v. Wolcott* (4 *Mad.* 11) is a decision binding on this Court. *M'Donald v. Bryce.*

Page 581

3. Bequest of residue to *Robert*, the eldest son of *Peter*, upon his coming of age; failing him, to the next male child of *Peter* who shall attain twenty-one; and failing the male children of *Peter*, to seven legatees (named), and the survivors and survivor of them. *Robert* died an infant, and *Peter* survived all the residuary legatees, and had no other child. Held, that the survivorship had reference to the death of *Peter*, that the gift failed, and that the residue belonged to the testator's next of kin. *Ibid.*

TAXATION.

1. Held, by the Master of the Rolls that after judgment by default, in an action of debt for a solicitor's bill, in which the amount had not been ascertained, a taxation may be ordered, upon sufficient "special circumstances." But held, on appeal, by Lord *Cranworth*, that there could be no taxation under the statute after final judgment; Lord Justice *Knight Bruce*, however, expressing no opinion on the point. *Re Barnard.* 5
2. Held, secondly, by Lord *Cran-*

but, under the 39th section, or third party interested clause, the application is special. *Re Stranford.* 27

4. Where a married woman employs a solicitor and makes her separate estate liable, she is, though not personally liable, a "party chargeable" within the meaning of the 37th section of the 6 & 7 Vict. c. 73. *Waugh v. Waddell.* 521

5. Pending a reference for the taxation of a solicitor's bill against a married woman, the solicitor cannot maintain a suit to enforce a lien for his bill of costs on her separate estate. *Ibid.*

6. On the day appointed for paying off a mortgage, the solicitor of the mortgagee refused to part with the title deeds until payment of his bill of 18*l.*, which had been delivered two days previously. It was paid under protest. The Court refused a taxation, no pressing necessity for the title deeds appearing, and no items of overcharge being distinctly shown. *Re Finch.* 525

two persons
for taxation
of the costs
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THE
1. A testator
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and to the accumulations accrued down to 1827, together with simple interest thereon from that time to the day of payment in 1852. *Bryan v. Collins.* Page 14

2. By operation of law, an accumulation for more than twenty-one years may legally take place. *Ibid.*

17

TIME TO ANSWER.

See PLEA.

TIME, OF THE ESSENCE OF,

See VENDOR AND PURCHASER, 7.

TIME THE ESSENCE OF CONTRACT.

See VENDOR AND PURCHASER, 2, 3, 4, 5.

TITLE.

See VENDOR AND PURCHASER, 8, 11.

TITLE, ACCEPTANCE OF.

A purchaser having retained the abstract for five months, made no objections to the title, but simply required the vendor to verify the abstract with the title-deeds. Held, that he must be deemed to have accepted the title. *Pegg v. Wisden.* 239

TRANSFER.

See BANKING COMPANY.

TRUST.

See MORTGAGE, 5, 6.

POWER, 7, 8, 9.

SETTLEMENT.

TRUSTEE.

1. In appointing new trustees, the Court is not limited to the number originally nominated. *Plenty v. West.* Page 356
2. The appointment of a new trustee under a power, pending a suit for administration, is not necessarily invalid. *Graham v. Graham.* 550
See BREACH OF TRUST, 1, 2.

INTEREST, 1, 2.

PARTITION, 2.

PAYMENT INTO COURT.

POWER, 2, 3, 5, 7, 8, 9.

RAILWAY, 3, 4, 5, 6, 7.

REVOCATION, 2.

TRUSTEE ACT.

See VENDOR AND PURCHASER, 9.

TRUSTEE AND CESTUI QUE TRUST.

See PARTIES, 2.

TRUSTEE RELIEF ACT.

Trust monies being paid into Court under the Trustee Relief Act, Held, that the costs of an application for payment of the income to the tenant for life ought to be paid out of the *corpus*. *In re Field's Trust.* 146

ULTRA VIRES.

See RAILWAY, 1, 6.

UNIFORMITY OF DECISION.

Observations as to the necessity of preserving an uniformity of decision in the different courts. *Parkin v. Thorold.* 59

to *A.* engaging to replace the 6,000*l.* in the three per cents. In 1822, *B.* admitted his obligation to restore to *A.* the stock sold out. The Court, in 1852, considering that the contract was for restoring the stock, and that *A.* had not the option of taking stock or money, held that the contract was not usurious. *Goddard v. Lethbridge.*

Page 529

VENDOR AND PURCHASER.

1. Property, sold as copyhold, turned out to be partly freehold. Held, that the vendor could not compel a specific performance, and that special conditions, providing that errors in the description should not invalidate the sale, and for a compensation, did not alter the case. *Ayles v. Cox.* 23
2. The time specified for the delivery of the abstract, held, in equity, not to be of the essence of the contract. *Roberts v. Berry.* 31
3. On a sale on the 22nd *July*, the conditions provided that the ab-

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completed within six weeks, he should treat the notice as void and the right of purchasing as forfeited. The purchase was not completed within the six weeks. Held, first, that though a conditional right to purchase must be strictly complied with, yet time was not in this case of the essence of the contract; secondly, that if it had been, it was waived by the landlord's insisting on the contract after the expiration of the three months; thirdly, that time was not made of the essence of the contract by the notice; and, fourthly, that six weeks was not, under the circumstances, a reasonable time. *Pegg v. Wisden*. Page 239

8. Costs to which a purchaser under the Court is entitled, on its being found that a good title cannot be made. *Perkins v. Ede*. 268
9. A vendor agreed to surrender or procure some person to surrender, and the costs of the surrender were to be paid by the purchaser. It was found necessary to procure a surrender under the Trustee Act. Held, that the costs of the proceedings ought to be paid by the vendor. *Bradley v. Munton*. 294
10. A purchaser under an order in lunacy paid his purchase money, in the manner directed by the Lords Commissioners in Lunacy, disregarding a charge of the Plaintiff and a suit to enforce it, of which he had notice. The amount was principally applied in payment of the costs of the receiver in

lunacy relating to the sale, &c. Upon a bill by the Plaintiff to make the purchaser liable for not seeing to the due application of the purchase-money, the *Master of the Rolls* considered himself bound by the order in lunacy, and as having no jurisdiction to alter it, retained the bill, with liberty to the Plaintiff to apply in lunacy for the discharge or variation of the order. *Norris v. Lord Dudley Stuart*. Page 359

11. *A. B.* died in 1831, intestate and without heirs, having mortgaged his estate in fee. Held, that the mortgagee could not, in 1852, make a good title to the fee; for, although he took the equity of redemption as against the Crown, yet he held it subject to *A. B.*'s debts, and there was no proof of their having been satisfied. *Beale v. Symonds*. 406
12. After decree against a purchaser for specific performance, the Defendant made default in payment of the purchase-money. Held, that the vendor was entitled to rescind the contract. *Foligno v. Martin*. 586

See CONVEYANCE.

LIEN.

OPENING BIDDINGS.

PRE-EMPTION.

TITLE, ACCEPTANCE OF.

VOLUNTARY SETTLEMENT.

1. Doctrine of the Court as to voluntary and incomplete settlements. *Bridge v. Bridge*. 315

of a volunteer, equity will compel the execution of the trust; but if he merely assigns the stock and makes no transfer, the Court will afford him no assistance. *Ibid.*

4. If the beneficial owner of stock standing in the name of trustees assign it in favour of a volunteer, and notice is given to the trustees, who act upon it, equity will enforce the performance of the trust in favour of the volunteer. *Ibid.*

5. When the owner of property, vested in *A.* and *B.* as trustees, purported to assign it to himself and others, in trust for volunteers, but no legal transfer was made, or recognition of the trust by *A.* and *B.*, held, that the relation of trustee and *cestui que trust* had not been created in favour of such volunteers. *Ibid.*

6. Voluntary settlement of an equitable interest in real estate held ineffectual, the legal estate not having passed to the trustees thereof. *Ibid.*

7. The Plaintiff being entitled to

ferred to *B.*, but bonds, there he accepted trustees whom the real having

8. A post wife's estate to the wife, with remainder, with remainder, &c., is a subsequent band and tlement modification his life the wife a good Hewison

WILL.

1. Bequest to *A.* during widowhood, and immediately after her death or second marriage, whichever event should first happen, to trustees to sell and divide between several persons named, or such of them as should be living at the death of *A.* *A.* married again. Held, that the property thereupon became immediately distributable. *Bainbridge v. Cream.* Page 25
2. A testator bequeathed his residue to his nieces *A.* and *B.*, and he then confined the gift to *A.* and *B.* and their children, without comprehending their husbands unless his nieces should die without issue. Held, that *A.* and *B.* took for their separate use for life, with remainder to their children, and that in default, the nieces took absolutely. *Dawson v. Bourne.* 29
3. Bequest to *A.* for life, and afterwards equally between a number of persons by name, and in case of the death of any of them before *A.*, their respective shares to go to their respective children, and in failure of children to the survivors. The following points were decided as to the several original legatees: — First, *Ann* was deceased at the date of the will: Held nevertheless, that her children took by substitution. Secondly, *William* was living at the date of the will, but he died before the testator. Held, also, that his children took his share, and that the class was to be ascertained at the death of the testator. Thirdly, *Thomas* survived the testator and died in the lifetime of the widow. Held that his children took, but were to be ascertained at *Thomas's* death. Fourthly, it was held, that to entitle a child to take, it was not necessary that he should survive the tenant for life. Fifthly, *Charles* died without issue. Held, that the survivors were to be ascertained at his death, and not at the death of the tenant for life. *Ive v. King.* Page 46
4. A residue was given to the wife for life, and afterwards in separate moieties to different persons. One moiety was given over "in case of the death of any or either of them before my said wife," and the other "in case of the death of any or either of them," without specifying any period. Held, under the circumstances, that the gift over in both cases was to be construed on death "before my said wife." *Ibid.*
5. A testator left four testamentary instruments, duly executed. After the Ecclesiastical Court had held that the second and third alone were valid as to the personal estate, this Court, on the certificate of the Common Pleas, decided, that as to the real estate, the last instrument alone constituted the last will. *Plenty v. West.* 173
6. Bequest of leaseholds, upon trust to assign unto all the children of *A. B.* on their respectively attaining twenty-one, and if one child, to assign to such child (omitting on attaining twenty-one).

An only child, who died an infant, was held to take a vested interest. *Walker v. Mower.*

Page 365

7. Trust funds were limited to a married woman absolutely if she survived her husband, but, if she pre-deceased him, she was to have a general power of appointment by will. The wife survived her husband. Held, that the power had not arisen, and that therefore her will, made during the coverture, was inoperative. *Trimmell v. Fell.* 537

See ABSOLUTE INTEREST.

CHARGE OF DEBTS.

CHILDREN.

CODICIL.

CONTRIBUTORY.

DEMONSTRATIVE LEGACY.

See DEVISE.

ELECTION.

EXONERATION.

EXTRINSIC EVIDENCE.

FUNDED PROPERTY.

GIFT OVER.

HEIR.

INCOME.

LEASEHOLDS.

LEGATEE.

NEXT OF KIN.

PER CAPITA.

POWER, 6.

REMOTENESS, 1, 2, 3, 4.

REVOCATION, 1.

SUBSTITUTION.

SUBSTITUTIONAL GIFT.

SURVIVORSHIP.

TENANT FOR LIFE.

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